Letting and Hiring in Roman Legal Thought: 27 BCE – 284 CE

PAUL J. DU PLESSIS

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By

Paul J. du Plessis

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On the cover: architectural detail of the library of Celsus, Ephesus.

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“To write history using legal sources alone is inadvisable; whenever possible other evidence should be employed too.”

Johnston, D. *Roman law in Context* (Cambridge 1999), 29.

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PdP
9 January 2012

ABBREVIATIONS

BCE	Before the Common Era
CE	The Common Era
CIL	Corpus Inscriptionum Latinarum
C.	Codex
D.	Digesta
FIRA	Fontes Iuris Romani Antejustiniani
Inst.	Institutes of Justinian
Inst.Gai.	Institutes of Gaius
P. Oxy.	Oxyrynchus Papyri
pr.	Principium
TPSulp	Tabulae Pompeianae Sulpiciorum

LIST OF ROMAN JURISTS CITED

Africanus (Sextus Caecilius Africanus)	(Late second century CE)
Aristo (Titius Aristo)	(First–second century CE)
Celsus (filius) (Publius Iuventius Celsus)	(Second century CE)
Florentinus	(Third century CE)
Gaius	(Mid–second century CE)
Iavolenus (Lucius Iavolenus Priscus)	(Late first century CE)
Labeo (Marcus Antistius Labeo)	(Late first century BCE–11 CE)
Longinus (Gaius Cassius Longinus)	(First century CE)
Marcian (Aelius Marcianus)	(Third century CE)
Neratius (Lucius Neratius Priscus)	(Early second century CE)
Paul (Iulius Paulus)	(Early third century CE)
Pomponius (Sextus Pomponius)	(Second century CE)
Proculus (Sempronius Proculus)	(First century CE)
Sabinus (Massurius Sabinus)	(Early first century CE)
Scaevola (Quintus Mucius Scaevola)	(Late second–early first century BCE)
Servius (Servius Sulpicius Rufus)	(c. 106–43 BCE)
Ulpian (Domitius Ulpianus)	(170–c. 223 CE)

A NOTE ON TRANSLATIONS

To ensure that the texts cited in this book are accessible also to those who do not have a working knowledge of Latin, I have added translations to all passages cited in the text and in the footnotes. For passages from D.19.2, the title in the Digest of Justinian devoted to letting and hiring, I have used the 1891 English translation of Monro. For passages from other titles in the Digest which mention the contract of letting and hiring I have used the 1985 English translation edited by Watson. For passages from the Codex of Justinian, I have used the online translation by Blume from the first half of the twentieth century. For passages from the Institutes of Gaius, I have used the 1988 English translation by Gordon and Robinson. For passages from the *Sulpicii* archive, I have used the English translations by Jones in his 2006 book. For passages from the Siebenburger Tablets, I have used the English translation of Berger from his 1948 article on the topic. All passages taken from the works of Latin authors refer to the Loeb editions of those works. All other translations are my own and are noted as such.

INTRODUCTION

The Institutional scheme of Roman private law set out by the jurist Gaius in his Institutes, an introductory textbook written for law students in the mid-second century CE, classifies the contract of letting and hiring as one of four contracts (alongside sale, partnership and (indirect) agency) which in Roman law could be created by mere consent of the parties to the contract.[1] Not much is known about the origins of this scheme and whether the categories contained in it were conventional or were newly created by Gaius.[2] It is commonly assumed, however, that by the time Gaius wrote his Institutes, the contracts grouped together to form the "consensual" category had already existed for at least three centuries.[3] During this period they had developed from humble beginnings into ubiquitous and important transactions which provided the legal framework for much of Roman commerce. Mainly for these reasons, these four contracts were examined in forensic detail by the Roman jurists of the classical period, that is the first three centuries of the common era. This book will focus on one of these four contracts, letting and hiring, and, to explain the methodology that will be employed and the contribution which this book seeks to make to the existing body of scholarship on the contract, a survey of the literature must be provided.

The sheer volume of books and articles which have appeared on various aspects of the Roman contract of letting and hiring during the twentieth century is an indication of the continuing popularity of this subject in modern scholarship.[4] Using a brief timeline of influential monographs on the subject, certain trends in the academic study of the contract of letting and hiring may be indentified. In constructing this timeline, specific attention has been paid to scholarship of the twentieth century which continues to be influenced by the legacy of German dogmatic legal thought of the nineteenth century whereby Roman legal rules were viewed as abstract intellectual constructs devoid of any context.

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1 Inst.Gai.3.135–138. On the significance of the Institutional Scheme, see Birks, P. and McLeod, G. *Justinian's Institutes* (London 2001), 8–28.

2 See Stanojević, O. *Gaius Noster—Plaidoyer pour Gaius* (Amsterdam 1989), chapters 3–5.

3 Watson, A. *The Contract of Mandate in Roman Law* (Oxford 1961), 9–10 and also Watson, A. *The Law of Obligations in the Later Roman Republic* (Oxford 1965), 100–101.

4 For a recent bibliographical survey, see Impallomeni, G. "Locazione nel diritto romano" in *Scritti di diritto romano e tradizione romanistica* (Padova 1996), 651–659, 651–652.

The first book of the twentieth century to examine the Roman contract of letting and hiring as its main focus was that of Costa in 1915.[5] In this interesting work, Costa focused solely on letting and hiring of movable and immovable property (*locatio conductio rei*). This is hardly surprising, since the bulk of the two titles (D.19.2 and C.4.65) in which the contract is treated in Justinian's compilation of Roman law are concerned with letting and hiring of (mainly immovable) property. Despite its specific focus, Costa's work, which was clearly influenced by dogmatic legal thought, laid the foundations for many of the debates explored in subsequent books and articles such as the origins of the contract, its "characteristics", the contractual obligations of the parties and the ways in which the contract could be created and terminated at law.

The next influential book to appear on the subject of the Roman contract of letting and hiring was that of Mayer-Maly in 1956.[6] This work, a product of the (then) prevailing fashion for interpolation criticism, a methodology which took a particularly invasive approach to establishing the "classicity" of Roman legal texts, had a wider scope than that of Costa. Mayer-Maly investigated all three subdivisions commonly ascribed to the contract of letting and hiring in the civilian tradition, namely letting and hiring of movable and immovable property (*locatio conductio rei*); of services (*locatio conductio operarum*) and of the completion of a specific task (*locatio conductio operis faciendi*). Like Costa, the author focused primarily on legal sources, often at the expense of other source material (though he did touch briefly on certain socio-economic aspects of the contract in the final chapter). Mayer-Maly's book was a product of its time and treated legal rules as intellectual constructs *in abstracto* with little regard for the context in which they may have operated. In terms of the subject matter covered in this book, Mayer-Maly followed Costa's lead, but with greater emphasis on the classification of different "types" of letting and hiring and on the standards of contractual liability, topics both favoured by Kaser who was rumoured to have been the intellectual inspiration behind this work.[7] Shortly thereafter, Amirante published a monograph-length article of more than one hundred pages in which he engaged with Mayer-Maly's research on letting and hiring.[8] It was mainly concerned with the vexed question of the structure of the contract in light

[5] Costa, E. *La locazione di cose nel diritto romano* (Turin 1915).

[6] Mayer-Maly, T. *Locatio conductio: Eine Untersuchung zum klassischen römischen Recht* (Vienna/Munich 1956).

[7] Kaser, M. "Review: Mayer-Maly, T. *Locatio conductio: Eine Untersuchung zum klassischen römischen Recht* (Vienna/Munich 1956)" 1956 *ZSS* (rA) (73), 424–431.

[8] Amirante, L. "Ricerche in tema di locazione" 1959 *BIDR* (3), 9–119. See also Mayer-Maly,

of Mayer-Maly's book. Although not a monograph, this work has since been recognised as one of the most significant monograph-length contributions on the subject.

The next book on the contract was that of Kaufmann in his 1964 monograph on letting and hiring in early Roman law.[9] As the title suggests, this work had a particular focus. It was a comprehensive investigation into the origins and prehistory of the contract of letting and hiring in the period before it received legal recognition as a consensual contract at the latest in the mid-second century BCE.[10] In many respects, Kaufmann's treatment of the contract within the larger context of the development of the Roman state and society heralded the start of a new approach in academic scholarship on this contract and paved the way for a number of subsequent works on letting and hiring.[11] This new approach focused less on the legal rules comprising the contract of letting and hiring *in abstracto* and more on the context in which these rules were created and in which they functioned.

It took some time for this new approach to take hold. It was not until 1980 that a comprehensive example of it appeared when Frier produced his study on urban tenancy in classical Roman law.[12] In this book, Frier focused on one aspect of the contract alone, namely the renting of urban property for habitation. The aim of this study was to prove his underlying (economic) thesis that the legal rules of urban tenancy were developed by the Roman jurists to cater for the needs of wealthy "middle-class" tenants who had sufficient financial and social clout to defend their interests in the contract of letting and hiring in a court of law.[13] This new method of reflecting on the Roman contract of letting and hiring in the context of Roman society was swiftly followed by De Neeve in his 1984 study on private farm

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T. "Tipicità e unita della *locatio-conductio*" 1959 *Labeo* (5), 390–397 for a critical review of Amirante's article.

9 Kaufmann, H. *Die altrömische Miete: Ihre Zusammenhänge mit Gesellschaft, Wirtschaft und staatlicher Vermögensverwaltung* (Cologne/Graz 1964). See also Amirante, L. "Review: Kaufmann, H. *Die altrömische Miete: Ihre Zusammenhänge mit Gesellschaft, Wirtschaft und staatlicher Vermögensverwaltung* (Cologne/Graz 1964)" 1965 *IVRA* (16), 322–334.

10 See Stoop, B.C. *Werkers en Werk in die Klassieke Romeinse Reg* (Unpublished PhD thesis) (Pretoria 1984), 196.

11 In a seemingly unrelated development, the publication of Crook, J.A. *Law and Life of Rome* (London 1967) sparked a renewed interest among ancient historians to examine Roman law in the context of Roman society.

12 Frier, B.W. *Landlords and Tenants in Imperial Rome* (Princeton, NJ. 1980). See also Crook, J.A. "Review: Frier, B.W. *Landlord and Tenants in Imperial Rome* (Princeton, NJ. 1980)" 1983 *JRS* (73), 213–214 who questioned the accuracy of Frier's basic premise.

13 See Frier, *Landlords and Tenants*, chapter 6.

tenancy in Roman Italy during the Republic and early Principate.[14] Since then, two of Frier's pupils have made important contributions to the subject. In her 1989 monograph on the organisation of private building, Martin, in her investigation of the use of the contract of letting and hiring in the construction of private buildings in Rome, argued that the Roman jurists employed certain basic underlying notions which were adapted to suit specific circumstances.[15] While in 1997, Kehoe investigated the contract of agricultural tenancy using New Institutional Economics to ascertain whether the development of its legal rules was driven by economic considerations.[16]

The most recent monograph on the Roman contract of letting and hiring is that of Fiori in 1999.[17] This work followed a more traditional approach to the topic reminiscent of the works of Costa and Mayer-Maly but with certain important innovations. Fiori did not focus on the legal rules comprising the contract, but using a Jurist-centred approach favoured by Italian, German and French legal scholarship, he investigated the internal structure of the contract as developed by specific Roman jurists. He also assessed the structure of the contract in the context of the development of law in Western Europe with a view to reinvigorating the debate about the structure of the contract in modern civilian legal systems.[18]

This literary survey demonstrates that two academic approaches to the study of the Roman contract of letting and hiring have emerged during the course of the twentieth century. On the one hand, (mostly) legal historians have examined the rules of the contract as abstract expressions of legal doctrine with the aim to understand how and to what extent specific Roman jurists have contributed to their development.[19] Such an analysis is rooted in

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[14] De Neeve, P.W. *Colonus: Private Farm-Tenancy in Roman Italy during the Republic and early Principate* (Amsterdam 1984).

[15] Martin, S.D. *The Roman Jurists and the Organisation of Private Building in the Late Republic and Early Empire* (Brussels 1989).

[16] Kehoe, D.P. *Investment, Profit and Tenancy: the Roman Jurists and the Roman Agrarian Economy* (Ann Arbor, Mich. 1997). See also more recently, Kehoe, D.P. *Law and the Rural Economy in the Roman Empire* (Ann Arbor, Mich. 2007).

[17] Fiori, R. *La definizione della 'locatio conductio'—giurisprudenza romana e tradizione romanistica* (Naples 1999). This statement requires qualification. Since the publication of Fiori's 1999 study, three further monographs on specific aspects of letting and hiring have appeared, but these have had a narrow focus (*risk* and *remissio mercedis*). These will be mentioned where these specific aspects are discussed.

[18] For two reviews of Fiori's work see Guarino, A. "La multiforme *locatio-conductio*" 1999 *IVRA* (50), 1–5; Piro, L. "Definizioni perimetrale e *locatio conductio*" 2001 *Index* (29), 414–436.

[19] This method is based on a vast body of detailed scholarship relating to the reasoning of the Roman jurists. Important works include, Schulz, F. *Roman Legal Science* (Oxford 1946); 24–131; Stein, P.G. *Regulae Iuris: from Juristic Rules to Legal Maxims* (Edinburgh 1966), 28–110,

a dogmatic premise that law, as an inward-looking and self-referential discipline, is the preserve of an elite few (the jurists) and is somewhat removed from reality.[20] On the other hand, (mostly) ancient historians have favoured a "law and society" approach and have taken aspects of the contract of letting and hiring and have contextualised them with reference to Roman society in order to substantiate larger claims about issues such as labour and commerce.[21] Both approaches have been shown to contribute significantly to modern understanding of Roman law, but have yet to be harnessed collectively in relation to the contract of letting and hiring.[22] This is what this book will seek to provide. But it will go much further than merely providing a "context-based" analysis of the legal rules comprising the contract of letting and hiring. The publication of Fiori's study has destabilised much of the traditional narrative surrounding the contract. This narrative, as the literature survey has shown, has been constructed during the first part of the twentieth century on the basis of technical terms and watertight categories developed using the legacy of German dogmatic legal thought.[23] Since Fiori did not focus on the rules of law which comprise the contract, this book will asses the impact which his study has had on them.

But those readers who are expecting a dusty account of the rules and exceptions governing letting and hiring in classical Roman law will be disappointed by this work. As this book will demonstrate, it is no longer possible to view the contract of letting and hiring in terms of abstract rules and exceptions devoid of any context. This was not the Roman approach.

Horak, F. *Rationes Decidendi: Entscheidungsbegründungen bei den älteren römischen Juristen bis Labeo* (Aalen 1969), 289–295; Waldstein, W. "Entscheidungsgrundlagen der klassischen römischen Juristen" 1976 *ANRW* (15-1), 3–100; Schmidlin, B. "*Horoi*, *pithana* und *regulae*—Zum Einfluß der Rhetorik und Dialektik auf die juristische Regelbildung" 1976 *ANRW* (15-1), 101–130 and Stein, P.G. "The Roman jurists' conception of law" in *The Jurists' Philosophy of Law from Rome to the Seventeenth Century* (Dordrecht 2007), 1–30.

20 Watson, A. *The Spirit of Roman law* (Athens, Ga. 1995) generally.

21 For a measured account of the strengths and drawbacks of using legal evidence to make larger claims, see Martin, *Private Building*, Introduction.

22 See Cairns, J.W. and Du Plessis, P.J. (eds.) *Beyond Dogmatics: Law and Society in the Roman World* (Edinburgh 2007) for a survey of this debate. Influential earlier works include Momigliano, A. "The Consequences of New Trends in the History of Ancient Law" in *Studies in Historiography* (Worcester/London 1966), 239–256; Crook, J.A. "Legal History and General History" 1996 *BICS* (41-1), 31–36; Ernst, W. and Jakab, E. (eds) *Usus Antiquus Iuris Romani: Antikes Recht im lebenspraktischer Anwendung* (Munich 2005); Aubert, J-J. and Sirks, A.J.B. (eds.) *Speculum Iuris: Roman Law ad a Reflection of Social and Economic Life in Antiquity* (Ann Arbor, Mich. 2002).

23 See Avenarius, M. "Tradition, Vorverständnis und Wirkungsgeschichte der Quellen. Vom Einfluß der geistesgeschichtlichen Hermeneutik auf das romanistische Verstehen" in *Hermeneutik der Quellentexte des Römischen Rechts* (Baden-Baden 2008), 9–29.

Recent insights by scholars such as Martin, who has argued that the Roman jurists employed certain common underlying notions in their treatment of the contract of letting and hiring, and Kehoe, who has argued that the Roman law of agricultural tenancy was based upon a "normative reality",[24] that is idealised stock examples of the average landlord and the average tenant renting the average piece of land, have shown that much more emphasis needs to be placed on the scenarios discussed by the Roman jurists to understand the common ideas which they employed in developing the contract of letting and hiring. But this requires qualification. It is worth pointing out, as Molnár has done, that it would be a futile exercise to list all of the different "objects" which the Roman jurists mention in the course of their treatment of the contract of letting and hiring.[25] This book will avoid this, as to do so would open up the contentious debate about the "object" of the contract or the "object" of the obligation, concepts which were foreign to Roman legal thought.[26] Instead, it will focus on those scenarios which are comprehensively discussed in Roman legal sources with the aim to uncover underlying common ideas in this area of law.[27] I wish to stress that by focusing on these scenarios, I am not advocating that the Roman jurists engaged in wanton casuistry. This would be incompatible with modern understanding of Roman legal thought and the conceptualisation which occurred during the classical period. Rather, I wish to demonstrate, using these scenarios, some of the basic ideas which the jurists used to develop the law of letting and hiring.

As the contract of letting and hiring is its main focus, this book will concentrate on legal sources contained in the sixth-century compilation of Roman law created by order of the Emperor Justinian. Although these sources are known to have been augmented by the Byzantine compilers of Justinian's project, their core is widely accepted as being "classical", that is reflecting Roman law of the first three centuries CE.[28] Literary, epigraphic

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24 Kehoe, *Investment*, 138.

25 Molnár, I. "Object of *locatio conductio*" 1982 *BIDR* (85), 127–142, 127.

26 On this controversy, see most recently Fascione, L. "La determinazione dell'oggetto del contratto (compravendita e locazione)" in *Societas—Ius: munuscula di allievi a Feliciano Serrao* (Naples 1999), 67–97.

27 A similar approach is taken by Jakab, E. *Risikomanagement beim Weinkauf: Periculum und Praxis im Imperium Romanum* (Munich 2009), 1.

28 Johnston, D. "Justinian's Digest: The Interpretation of Interpolation" 1989 *OJLS* (9), 149–166; Lokin, J.H.A. "The End of an Epoch: *Epilegomena* to a Century of Interpolation Criticism" in *Collatio Iuris Romani* I (Amsterdam 1995), 261–273 and Watson, A. "*Prolegomena* to the Establishing of Pre-Justinianic Texts" 1994 *TvR* (62), 113–125.

and papyrological material will also be used, but to a limited extent and only where they contribute to modern understanding of the contract.[29] Literary and epigraphic sources present a unique set of challenges to a legal historian.[30] They contain abundant references to letting and hiring, but the bulk of these only mention incidentally that letting and hiring occurred and (with a few notable exceptions) reveal little about the legal mechanics of the contract. Furthermore, with the exception of new discoveries, these sources, while of course open to new interpretation, are well-trodden ground and have been mined extensively for additional information in earlier works. Papyrological material occupies a unique position. While the papyri of Graeco-Roman Egypt contain much more information about letting and hiring than any other available source, these cannot necessarily be taken to reflect "Roman" practice as discussed by the Roman jurists in their works, despite the fact that the contract was classified as one arising from the *ius gentium* and therefore also available to non-Roman citizens.[31] Furthermore, recent studies have confirmed that Graeco-Egyptian leases were conceptually different from those found in Roman law and while it cannot be ruled out that they may have influenced Roman law, each case has to be assessed on its own merits.[32] For that reason, references to papyri will be used sparingly.[33] Given the vast amount of material available, certain limits have been imposed on the investigation. With the exception of a few references, this book will not focus on the development of contractual proprietary interests such as *superficies* and *habitatio* as these arose in the law of property.[34] It will also not focus on the development of emphyteutic

29 See Gröschler, P. "Die pompejanischen und herkulanensischen Urkunden als Erkenntnisquelle für das römische Recht" in *Hermeneutik der Quellentexte des Römischen Rechts* (Baden-Baden 2008), 44–62.

30 The *Corpus Inscriptionum Latinarum* and the *Epigraphische Datenbank Claus—Slaby* have been used as a source for epigraphic material.

31 De Neeve, *Colonus*, 22.

32 Müller, H.G. *Untersuchungen zur Misthosis von Gebäuden im Recht der gräko-ägyptischen Papyri* (Cologne/Berlin/Bonn 1985), 303–304.

33 For a recent survey of papyrological discoveries regarding the eastern provinces of the Roman Empire, see Cotton, H.M. et al. "The Papyrology of the Roman Near East: A Survey" 1995 *JRS* (85), 214–235. The *APIS* (Advanced Papyrological Information System) database has been used as a source for papyrological material.

34 This book will not mention *locatio conductio irregularis*, a Pandectist invention which was unknown to Roman law. The main texts purporting to show this type of letting and hiring are D.19.2.31 (Lab. 5 Dig. a Paulo Epit.) and D.34.2.34 pr (Pompon. 9 ad Quint. Muc.). On these texts, see Benke, N. "Zum Eigentumserwerb des Unternehmers bei der *Locatio conductio irregularis*" 1987 *ZSS* (rA) (104), 156–237.

lease or of the later Roman colonate. These legal institutions developed towards the end of the period under investigation and have been studied rigorously in recent years.[35]

This book is divided into four chapters. Chapter one examines the terminology of the contract, its history, structure and the contractual process. Chapter two investigates letting and hiring of tasks (*operae*). Chapter three is concerned with the letting and hiring of movable and immovable objects (*res*), while Chapter four will be used to draw various conclusions.

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35 On the colonate, see for example, Mirković, M. *The Later Roman Colonate and Freedom* (Philadelphia, Pa. 1997) and most recently, Sirks, A.J.B. "The Colonate in Justinian's Reign" (2008) *JRS* (98), 120–143.

CHAPTER ONE

LETTING AND HIRING IN CONTEXT

1. Terminology and History

The Latin verbs *loco–are* (1) and *conduco–ere* (2), along with their associated nouns *locator* and *conductor*, form the root vocabulary of the Roman contract of letting and hiring. These verbs have various meanings, some of which are general and non-technical, others specific and technical. The general meaning of *locare* is to place/put/arrange and that of *conducere* to bring/lead together; to assemble/collect.[1] The legal meanings of these verbs reflect the sense of their general meanings: *locare* means to rent/let out and *conducere* to hire/accept something on hire.[2] These verbs first appear in sources in the fifth century BCE, a considerable period of time before the consensual contract of letting and hiring is said to have been created (at the latest) during the mid-second century BCE.[3] Because of this gap, it became fashionable during the nineteenth and early twentieth centuries to undertake etymological analyses of the use of these verbs in the period spanning the fifth to the mid-second century BCE in an attempt to shed light on the origins of the contract. Despite the paucity of source material extant for this period, studies of this kind were undertaken with remarkable vigour.[4] By the second half of the twentieth century, however, it had become apparent that little could be gained from them, especially since it had by then become generally accepted that etymology does not remain static. This led Mayer-Maly to declare that the use of the verbs prior to the mid-second century BCE in all likelihood bore little resemblance to their (technical) use after the

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[1] Glare, P.W.G. (ed.) *Oxford Latin Dictionary* (Oxford 1982), entries on the verb *loco—locare* and *conduco—conducere*; Lewis, C.T. and Short, C. *A Latin Dictionary* (Oxford 1962), entries on the verb *loco—locare* and *conduco—conducere*.

[2] Berger, A. *Encyclopedic* [*sic*] *Dictionary of Roman law* (Philadelphia, Pa. 1953), entries on the verb *loco—locare* and *conduco—conducere*.

[3] Watson, *Mandate in Roman Law*, 9–10 and also Watson, *The Law of Obligations*, 100–101. For an interesting alternative hypothesis which suggests a much earlier date for the inception of the contract of letting and hiring, see De Ligt, L. "Studies in Legal and Agrarian History II: Tenancy under the Republic" 2008 *Athenaeum* (88), 377–391.

[4] Kaufmann, *Die altrömische Miete*, § 7.

creation of the contract.[5] This sceptical attitude has since become dominant and continues to prevail in modern literature on the subject as is evident in Fiori's 1999 book.[6]

Much remains unclear about the origins of this contract.[7] Although letting and hiring is conventionally assumed to have arisen at the very latest in the mid-second century BCE when the category of consensual contracts was created, it has been suggested that this event merely gave legal recognition to a factual state of affairs which had existed for quite some time before.[8] One of the most influential early theories on the origin of this contract is that of Mommsen who, in his 1885 article on the matter, proposed that the contract of letting and hiring originated in Roman public law.[9] In his view, the origins of *locatio conductio rei* lay in the practice of the censors who let out state land, while that of *locatio conductio operis* may be found in the letting out of the completion of public works and that of *locatio conductio operarum* in the practice of magistrates hiring *lictores* and attendants.[10]

Owing to the slender evidence on which Mommsen's hypothesis was founded, it was questioned by Costa in his 1915 book on the contract of letting and hiring.[11] Costa outlined an alternative hypothesis, namely that the earliest form of the contract, which in his view was the letting and hiring of immovable property, developed when legal recognition was given to an aspect of the patron-client relationship whereby a former master gave

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[5] Mayer-Maly, T. "Römische Grundlagen des modernen Arbeitsrecht" 1967 *RdA* (8–9), 281–286, 823; Stoop, *Werkers en Werk*, 197.

[6] Fiori, *Locatio conductio*, 13–14, 18, 21.

[7] Beck, A. "Zur Entstehung des römischen Mietvertrages" in *Festschrift Hans Lewald* (Basel 1953), 3–13.

[8] Kaufmann, *Die altrömische Miete*, § 7. The creation of the contract of letting and hiring in the mid-second century BCE is initimately connected to the rise of the *bonae fidei iudicia*, a list of which appears in Cicero *De Officiis* 3.17.70 (Loeb) where the author cites a list of legal transactions, including letting and hiring, which were said to have been compiled by Quintus Mucius Scaevola. Stoop, *Werkers en Werk*, 197 has argued persuasively that the earlier forms of letting and hiring were reorganised into the *bonae fidei iudicium* that is *locatio conductio*. See most recently Torrent, A. "La polemica sobre la tricotomia 'res', 'operae', 'opus' y los origenes de la '*locatio-conductio*'" 2011 *TSDP* (4), 1–51, 9, 36 and De Ligt, 2008 *Athenaeum* (88), 377–391, 388 who, following Kaser, suggests a date of somewhere in the mid-third century BCE. See also the intriguing hypothesis of El Bouzidi, S. "Les formes de negotiations des contrats. Une évolution institutionelle dans le monde rural au IIême s. av. J.C." 2000 *Gerion* (18), 147–158 who links the rise of the contract of letting and hiring with the socio-economic evolution of rural Italy in the 2nd century BCE.

[9] Mommsen, Th. "Die römischen Anfänge von Kauf und Miethe" 1885 *ZSS* (rA) (6), 260–275, 264, 267–268. See also Torrent, 2011 *TSDP* (4), 1–51, 11.

[10] Mommsen, 1885 *ZSS* (rA) (6), 260–275, 268.

[11] Costa, *La locazione di cose*, I § 6. See also De Ligt, 2008 *Athenaeum* (88), 377–391, 380 and Torrent, 2011 *TSDP* (4), 1–51, 38–39.

occupation rights in his property (*precarium*) to his freed slaves.[12] Although this theory did not escape criticism, especially in relation to the gratuitous nature of *precarium*, it gained widespread acceptance and continued to exert influence for some time afterward.[13] In 1953, Beck, building on Costa's views, proposed a more nuanced hypothesis regarding the origins of the contract of letting and hiring.[14] While still championing the patron-client relationship as the likely origins of the contract, Beck argued that the earliest manifestation of letting and hiring must have concerned the letting out of tasks (*operae*) rather than of property.[15] Variations of Costa's and Beck's hypotheses have featured extensively in scholarship on the Roman contract of letting and hiring. In 1956, for example, Mayer-Maly in his analysis of the origins of the contract of letting and hiring mentioned both theories, but at the same time cautioned that much remained unclear.[16]

An in-depth analysis of the history of the contract appeared in 1964 when Kaufmann published a comprehensive study on the prehistory of the contract of letting and hiring. In this study, Kaufmann undertook a meticulous analysis of the likely legal origins of the contract of letting and hiring in light of the socio-economic circumstances of Roman society from the time of the Twelve Tables in the mid-fifth century BCE to the recognition of letting and hiring as a consensual contract at the latest in the mid-second century BCE. This analysis demonstrated that the contract of letting and hiring had a number of different historical roots, some of which were informal, and which were combined to form the contract. The period which formed the core of Kaufmann's analysis is not the main focus of the present book and his analysis of the different historical roots of the contract is broadly regarded as being correct.[17] Given the widespread acceptance of Kaufmann's thesis, it is hardly surprising that since 1964 there have only been three further academic contributions on the prehistory of the contract of letting and hiring. In 1977, Leuregans resurrected Mommsen's hypothesis that letting and hiring was essentially based on an earlier model in Roman

12 Costa, *La locazione di cose*, I §§ 3–4. For criticisms of this theory, especially with reference to the gratuitous nature of *precarium*, see De Ligt, 2008 *Athenaeum* (88), 377–391, 380–381 and Torrent, 2011 *TSDP* (4), 1–51, 41.

13 Kaser, M. *Das altrömische Ius* (Göttingen 1949), 297. Alzon, C. "Réflexions sur l'histoire de la *locatio-conductio*" 1963 *RHDFE* (4–1), 553–591, 590–591.

14 Beck, *Zur Entstehung*, 3–13.

15 Beck, *Zur Entstehung*, 4.

16 Mayer-Maly, *Locatio conductio*, 15–16.

17 See Amirante, 1965 *IVRA* (16), 322–334. For criticisms of Kaufmann's theory, see De Ligt, 2008 *Athenaeum* (88), 377–391, 381.

public law.[18] This article did not attract widespread comment. Thereafter in 1999, Fiori briefly mentioned the history of the contract.[19] He concluded, citing Kaufmann's meticulous analysis of the historical roots of the contract, that there is little to add to this debate since many aspects of the prehistory of the contract remain unclear.[20] Most recently, De Ligt, following Kaser, has argued that the origins of letting and hiring must be sought in the link between sale and letting and hiring whereby in early Roman law, letting and hiring was treated as a "temporary sale".[21] This intriguing hypothesis deserves further investigation, but since the focus of this book is the classical period, it is best left for another occasion. Suffice it to say, as this brief survey of views has demonstrated, that the origins of the contract of letting and hiring are by no means settled.[22]

2. Structure

The structure of the contract of letting and hiring is much disputed.[23] The crux of this debate is whether the Roman jurists conceptually subdivided the contract into the letting and hiring of things (*locatio conductio rei*), of services (*locatio conductio operarum*) and of the completion of a task (*locatio conductio operis*) as is done in many contemporary civil-law systems based on Roman law.[24] The Roman jurists never mention the threefold subdivision explicitly and it cannot be traced in any of the available sources, but, owing to the state of their preservation, it cannot be dismissed completely either. Much of the scholarly debate on this topic has therefore centred on textual interpretations and implied assumptions which have been read into Roman juristic discussions.[25] It is not the purpose of this book to

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[18] Leuregans, P. "L'origine administrative du terme *locatio* dans la *locatio-conductio* romaine" 1977 *Eos* (65), 303–322. See also Torrent, 2011 *TSDP* (4), 1–51, 40.

[19] Fiori, *Locatio conductio*, 13–14.

[20] Fiori, *Locatio conductio*, 18. See also Möller, C. *Freiheit und Schutz im Arbeitsrecht* (Göttingen 1990), 26–27.

[21] De Ligt, 2008 *Athenaeum* (88), 377–391 at 385 following Kaser, *Das altrömische Ius*, generally.

[22] Möller, *Freiheit*, 27 has also questioned whether an analysis of the prehistory of the contract can provide any useful insights into the contract.

[23] The most recent comprehensive survey of the literature on this debate may be found in Fiori, *Locatio conductio*, 1–10.

[24] See, for example, De Bujan, F. *Sistema contractual romano* 3rd ed. (Madrid 2007), 284; Möller, *Freiheit*, 34–35.

[25] See, for example, Lewis, A.D.E. "The Trichotomy in *locatio conductio*" 1973 *IJ* (8), 164–177.

enter into the complex debate surrounding the structure of the contract, since this matter has been thoroughly explored in Fiori's study. He demonstrated that the trichotomy was unknown to Roman law and surfaced first in the history of the European *ius commune* from where it came to exert influence on modern legal systems.[26] In his view, the debate over the trichotomy gained promincence in Roman-law scholarship towards the end of the nineteenth century owing to discussions surrounding the structuring of the contract of letting and hiring in the German Civil Code of 1900.[27] The legacy of this debate continued to influence Roman-law scholarship during the course of the twentieth century with ever more complex points of view emerging.[28] One group of scholars argued that the contract of letting and hiring in Roman private law was a single undifferentiated entity; others that it was a disparate range of transactions loosely grouped together under the banner of one contract and a third group supported a composite position.[29] In Fiori's view the modern debate on the subject has been complicated further by the lasting influence of Pandectist legal thought which has shifted modern scholarly focus away from the Roman notion of the reciprocal contractual obligation underlying the contract to notions such as the "object" of the contract (an object/a task/a service), the content of the obligation and the associated *essentialia* of each type of letting and hiring.[30]

A detailed analysis of the Roman-law texts led Fiori to propose a nuanced version of the unitary theory.[31] In Roman law, the contract of letting and hiring was a single entity based on an underlying reciprocal obligation created by consent.[32] In the contract of letting and hiring the reciprocal nature of this obligation, described by the term *synallagma*, pervaded all aspects of the contract.[33] One part of the reciprocal obligation was expressed by the Roman jurists using the term *merces* (rent). The other part was expressed by the fundamental yet often fluid dichotomy of a thing (*res*)/a person (*homo*)

26 Fiori, *Locatio conductio*, 2; Stoop, *Werkers en Werk*, 198–202 and also Torrent, 2011 *TSDP* (4), 1–51, 1–4.

27 Fiori, *Locatio conductio*, 362–364.

28 Fiori, *Locatio conductio*, 3–6.

29 Fiori, *Locatio conductio*, 7–10. On this see most recently Kovacs, A. "Quelques observations sur la division de la *locatio conductio*" in *Iura Antiqua—Iura Moderna: Festschrift für Ferenc Benedek zum 75. Geburtstag* (Budapest 2001), 217–230.

30 Fiori, *Locatio conductio*, 362–364.

31 Fiori, *Locatio conductio*, 361–366.

32 Fiori, *Locatio conductio*, 286–290.

33 Benöhr, H-P. *Das sogenannte Synallagma in den Konsensualkontrakten des klassischen römischen Rechts* (Hamburg 1965), chapter 3.

which existed in Roman law.[34] The Roman jurists explored this dichotomy at length in their conceptual thinking regarding this obligation. Where the contract dealt with a thing (whether movable or immovable) they identified the permissible use and enjoyment of the thing agreed in the contract (that is through consent) (expressed in the texts as *uti frui*) as a crucial element of the obligation. Thus, the contractual obligation may be expressed as *merces* ↔ (permissible *uti frui* of a) *res*. Or, phrased differently, under the contract of letting and hiring of a thing, the parties agreed that the *conductor* would pay *merces* in return for the *uti frui* of a thing for a period of time. It is important to stress, however, that the Roman jurists did not conceive of the *res* as the "object" of the contract or the *uti frui* as the "content" of the obligation.[35] These are modern conceptions which were alien to Roman legal thought. They did not use terminology in this technical manner. Where the contract dealt with a person, the Roman jurists did not use the terms *uti frui*, but instead used the term *operae* (tasks) (in a more general sense). Here, the contractual obligation may be expressed as *merces* ↔ (*operae* of a) *homo*. In this case, *merces* was paid in return for *operae*. It should again be stressed that the *homo* was not the "object" of the contract, nor were the *operae* the "content" of the obligation. The Roman jurists did not use the terms in this manner.

3. The Contractual Process

Two issues are central to the formation of the contract, namely the contractual capacity of the parties and their intention to contract.[36] It seems fair to state that the capacity of the parties to enter into a contract of letting and hiring would not necessarily have been at the forefront of their minds when considering whether to engage in letting and hiring, except in those cases where it was of prime importance for purposes of establishing contractual liability (e.g. women under guardianship, children-in-power and slaves).[37] For the most part, the texts show that contractual capacity only became an issue when the validity of the contract was challenged *ex post facto* in the context of litigation.

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[34] Fiori, *Locatio conductio*, chapter 6 generally.

[35] Fiori, *Locatio conductio*, chapter 7 generally.

[36] Mayer-Maly, *Locatio conductio*, 81.

[37] On liability for slaves see D.19.2.11 pr (Ulpian 32 ad Ed.), C.7.16.20 (a. 293) and extensively MacCormack, G. "*Culpa in Eligendo*" 1971 *RIDA* (18), 521–555, 540–541; Knütel, R. "Die Haftung für Hilfspersonen im römischen Recht" 1983 *ZSS* (rA) (100), 340–443, 344–353, 401–405.

It would serve little purpose to list every example of a contracting party mentioned in Roman legal texts. Suffice it to say that they reveal the full spectrum of Roman society.[38] The rules relating to contractual capacity (age, status, sex and mental capacity) which governed all contracts in Roman law applied equally to the contract of letting and hiring. Matters of this kind are mostly discussed by the Roman jurists in the context of the legal remedies available to the parties.

The contract of letting and hiring was classified as one arising from the *ius gentium*.[39] This means that the use of the contract was not restricted to Roman citizens as the following text shows:

> D.48.22.15 pr[40] Marcianus libro … Deportatus civitatem amittit, libertatem retinet et iure civili caret, gentium vero utitur. Itaque emit vendit, locat conducit, permutat, fenus exercet aliaque similia. …
>
> A deported person loses his citizenship but retains his freedom and while he loses the *jus civile*, he employs the *jus gentium*. He accordingly buys, sells, leases, hires, barters, lends money, [and does] other things of the same kind. … [Watson translation]

Marcian, a jurist of the early third century CE, states that various legal transactions including the contract of letting and hiring are not restricted to those entitled to use the civil law, namely Roman citizens and foreigners who had been granted *commercium*. It could be used even by those who have undergone a *capitis diminutio* by being banished. Since Marcian is known to have been active during the time of the enactment of the *Constitutio Antoniniana* in 212 CE when most inhabitants of the Roman Empire acquired citizenship through Imperial decree, this statement becomes all the more important. Whatever the motive behind Marcian's statement may have been, it seems clear that even prior to 212 CE it did not matter for the purpose of the contract of letting and hiring whether someone had Roman citizenship or not.[41] The position in classical Roman law must be contrasted to that of later periods when various restrictions on the use of the contract were imposed especially during the Dominate. Both Costa and

38 Knapp, R. *Invisible Romans* (London 2011), 89 mentions a female fuller collecting rents and (at 90) a female agricultural worker who laboured in an olive press for a wage.

39 D.19.2.1 (Paul. 34 ad Ed.), D.1.1.5 (Herm. 1 Epit.)

40 Although there are problems with the location of this text in the Digest, its content is not disputed.

41 It also justifies the position taken by this book in relation to information for Graeco-Egyptian law.

Mayer-Maly have shown that in post-classical and Justinianic Roman law, certain categories of citizens were prohibited from becoming *conductores* of land, such as members of local town councils, soldiers and slaves in the Imperial bureaucracy. None of these prohibitions seem to have existed in the classical period and they seem to have been largely public-order regulations which were introduced to address specific issues in the later Empire.[42]

Apart from matters of contractual capacity, the parties must have intended to conclude an agreement which the legal order regarded as one of letting and hiring. This is a particularly important issue in a "closed" system of contracts such as Roman contract law. Depending on the complexity of the transaction (and presumably also its commercial value), they may have sought legal advice, but it cannot be assumed that every contract mentioned in the texts, especially those which were less complicated or perhaps fleeting, were necessarily based on prior legal advice. In dealing with intention, the Roman jurists focused on the *voluntas* of the parties seeking to enter into a contract of letting and hiring.[43] This term occurs in a handful of Roman legal texts on the subject. Its meaning is best illustrated by the following two texts.

> D.19.4.1.2 (Paul. 32 ad Ed.) Item emptio ac venditio nuda consentientium voluntate contrahitur, permutatio autem ex re tradita initium obligationi praebet: alioquin si res nondum tradita sit, nudo consensu constitui obligationem dicemus, quod in his dumtaxat receptum est, quae nomen suum habent, ut in emptione venditione, conductione, mandatum.
>
> Again the contract of sale and purchase is contracted by the bare will of the parties in reaching agreement, while barter leads on to an obligation [only] when an object is delivered. Otherwise, if the object were not yet delivered, we will rule that the obligation was contracted by mere agreement, something which is reserved only for those contracts which have their own name, like sale and purchase, hire, and mandate. [Watson translation]
>
> D.44.7.31 (Marcian. 2 Fideicomm.) Non solum stipulationes impossibili condicioni adplicatae nullius momenti sunt, sed etiam ceteri quoque contractus veluti emptiones locationes, impossibili condicione interposita aeque nullius momenti sunt, quia in ea re, quae ex duorum pluriumve consensu agitur, omnium voluntas spectetur, ...

[42] Costa, *La locazione di cose*, II § 2, 9–11; Mayer-Maly, *Locatio conductio*, 81.
[43] On the meaning of and controversy surrounding this term, see Berger, *Encyclopedic Dictionary*, entry on *voluntas*.

> Not only are stipulations which are dependent on an impossible condition of no validity, but other contracts too, such as sales, lettings, in which an impossible condition has been introduced are equally of no validity; for in a matter which involves consent of two or more persons, the intent of everyone is looked at, …. [Watson translation]

Although *voluntas* is not the main focus of either of these texts, they provide important insight into the meaning of the term. *Voluntas* referred to the unilateral will of one or more parties intending to enter into a contract, while *consensus* referred to the united (common) will of the parties.[44]

Since the contract of letting and hiring was one of the four named contracts which could be created by consent alone, *consensus* was of prime importance in the creation of the contract. The meaning and function of *consensus* in Roman private law is a complex matter which has generated much academic debate.[45] This section will focus on the function of *consensus* in the context of the contract of letting and hiring only.[46] *Consensus* was the constitutive element of the contract of letting and hiring. This is expressed succinctly in D.44.7.2 pr-3 (Gaius 3 Inst.).[47] Roman law only required consent for letting and hiring to come into existence. It should be remembered that consent was not an abstract notion. The parties had to consent to the creation of all elements of the reciprocal obligation underpinning the contract of letting and hiring from which all the terms of the contract and consequently (to use modern terminology) the rights and duties of the parties were derived. Consent need not be given in person. This was an important commercial innovation which set the contract of letting and hiring apart from older forms of contracting such as the *stipulatio*. It also did not require a verbal response as long as the intention was clear.[48] Not only could *consensus* be achieved without a verbal response, it could also be achieved despite one of the parties having certain physical handicaps, provided that the person understood the nature of the transaction and was able to consent.[49] *Consensus* also had to be genuine and free from error.[50]

Letting and hiring was bilateral and was based on good faith in the sense that the *formula* of the actions allowed the judge to exercise his discretion

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44 See Inst.3.29.4.

45 Cascione, C. *Consensus: Problemi di origine, tutela processuale, prospettive sistematiche* (Naples 2003) generally.

46 Fiori, *Locatio conductio*, 363.

47 Compare Inst.Gai.3.135; Inst.3.22 pr-3.

48 D.45.1.35.2 (Paul. 12 ad Sab.).

49 D.44.7.48 (Paul. 16 ad Plaut.).

50 D.44.7.57 (Pompon. 36 ad Quint. Muc.).

to award whatever he deemed to be fair and reasonable under the circumstances. This linked the notion of what is fair and equitable, *bona fides* essentially, to the reciprocal obligation.[51] Since *consensus* was initimately connected to the underlying reciprocal obligation, it was not just an initial requirement for the contract to come into existence. It was a continuous requirement which had to be present for the duration of the contract.[52] The continuous nature of the *consensus* at the heart of the contract of letting and hiring is confirmed by various aspects of the contract such as the fact that tacit renewal of a contract of letting and hiring was possible.[53] Given the personal nature of the law of obligations, the continuing consent between the parties to the contract seemingly did not extend to third parties who had provided security for the payment of rent.[54] This reaffirms the fundamentally personal nature of the Roman law of obligations. Finally, since the contract was created by consent, it could be dissolved by contrary consent.[55]

Proving the existence of the consent (or indeed of specific arrangements which were made) could be difficult where the contract was entirely verbal. Although Roman law did not require writing for a contract of letting and hiring to come into existence, it is clear that, given the complexity of some of the commercial transactions falling within the wide spectrum of the contract of letting and hiring, the recording the provisions of the contract could be of some benefit to the parties. It is in this context that the concept of the *lex* in discussions of the contract of letting and hiring needs to be examined.[56]

Although classical Roman law did not require the parties to record the contract in writing, other sources indicate that this practice was adopted in many cases, usually to record a complex transaction. The relationship between the written record of the contract and the *consensus* at the heart of it is complex. On a basic level, the record may be said to be the prod-

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51 D.19.2.1 (Paul. 34 ad Ed.).

52 D.2.14.58 (Nerat. 3 Membr.). For an analysis of this text, see Mayer-Maly, *Locatio conductio*, 222. Compare C.4.65.34 (undated).

53 See D.19.2.14 (Ulpian. 72 ad Ed.). Compare C.4.65.16 (a. 260) which shows that the landlord's hypothec is also renewed tacitly. On this aspect, see most recently Pichonnaz, P. "Quelques remarques sur la *relocatio tacita*" 2002 *RIDA* (49), 147–163; as well as Serrano-Vicente, M. *Custodiam praestare: La prestación de custodia en el derecho romano* (Madrid 2006) generally.

54 D.19.2.13.11 (Ulpian. 32 ad Ed.). For an analysis of this text, see Mayer-Maly, *Locatio conductio*, 220–221.

55 D.46.3.80 (Pompon. 4 ad Quint. Muc.). Compare Inst.3.29.4; De Neeve, *Colonus*, 11.

56 For a more extensive discussion, see Du Plessis, P.J. "The Roman Concept of *lex contractus*" 2006 *Roman legal tradition* (3), 79–94 on which the following is based.

uct (or written manifestation) of the *consensus*. Written documents clearly had some evidentiary value and the way in which they were constructed and sealed appear to have been significant,[57] but the Roman jurists' conception of the "contract", that is the (mostly) written record of the agreement between the parties, is quite different from modern dispositive notions of contract. For one thing, the recording of the details of a commercial transaction, if undertaken at all, occurred in a rather random fashion with no clear pattern. These accounts, the closest Roman law ever came to a modern notion of a contract, require further investigation.

Surveys of the technical vocabulary of Roman law, such as Berger's *Encyclopedic Dictionary of Roman Law*, indicate that the term commonly used to describe the agreement in private law was *lex contractus*. According to Berger, this term: "... applied to all transactions between private individuals with regard to particular provisions of a specific contract".[58] Although this statement is broadly correct insofar as the Roman law of contract is concerned, the term does not appear in juristic discussions of letting and hiring.[59] Rather, the jurists employed two terms *lex locationis* and *lex conductionis*. The motivation for using two terms is uniquely Roman. *Locatio conductio*, as the terminology suggests, was a bilateral contract that (in modern terms) generated rights and duties for both the *locator* and *conductor*. The Roman jurists reinforced the bilateral nature of the contract in their discussions of the *lex*. Thus, when the juristic text concerned the *conductor* or the legal point was argued from that perspective, the term *lex conductionis* was used.[60] Conversely, when the legal text concerned the *locator* or his/her legal position, the term *lex locationis* appeared.[61]

The terms *lex locationis/conductionis* appear in a number of legal texts. These texts, when read together, provide some (but not much) information about the scope and function of the *lex* in the context of letting and hiring. It

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[57] Meyer, E.A. *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge 2004), chapter 8.

[58] Berger, A. *Encyclopedic Dictionary*, entry on *lex contractus*. According to the older view, the term *lex* was used in a non-technical manner to refer both to the entire agreement and the individual clauses contained therein, see De Neeve, *Colonus*, 5. The more recent view (De Neeve, op. cit.) is that written contracts were sometimes referred to using the term *forma*. This seems possible, but the textual evidence is too slight to draw any firm conclusions, see e.g. Inst.Gai.3.147; Inst. 3.24.3; D.24.3.7.3 (Ulpian. 32 ad Sab.).

[59] It occurs in a single text, see C.4.65.19 (a. 293).

[60] Compare e.g. C.4.65.6 (a. 244); D.19.2.15.1 (Ulpian. 32 ad Ed.); D.19.2.25.3 (Gaius 10 ad Ed. Prov.); D.19.2.55.2 (Paul. 2 Sent.); D.50.8.3.2 (Ulpian. 3 Opin.).

[61] Compare e.g. D.17.2.77 (Gaius 2 Rer. Cott.); D.19.2.9.3 (Ulpian. 32 ad Ed.); D.19.2.61 pr (Scaev. 7 Dig.).

is interesting to note that the term *lex conductionis* occurs more frequently than its counterpart. There may be a number of reasons for this, but on balance it seems most likely that it was merely an unintended consequence of the selection procedures of Justinian's commission.

Legal texts mentioning the *lex conductionis* provide the following information. First, the tenant was legally bound to observe the terms of the *lex*:

> C.4.65.16 (a. 260) Legem quidem conductionis servari oportet nec pensionum nomine amplius quam convenit reposci. …
>
> The terms of the lease must be observed, and no rent beyond the amount agreed can be demanded. … [Blume translation]

If the provisions of a *lex* were contravened, it provided grounds for the *actio conducti*:

> D.19.2.15 pr-1 (Ulp. 32 ad Ed.) Ex conducto actio conductori datur. Competit autem ex his causis fere: … vel si quid in lege conductionis convenit, si hoc non praestatur ….
>
> Every *conductor* has a right of action *ex conducto*. It arises for the most part in the following cases: … or some term of his contract is not observed on the part of the *locator*: …. [Monro translation]

Given that the *lex* was based on continuous *consensus*, its terms were fixed, but capable of legal interpretation.[62] Said interpretation had to occur within certain parameters. Thus, for example, earlier contracts concerning the same thing could not be used as evidence for interpreting the terms of later contracts.[63] Furthermore, acts by one or more landlords in contravention of the *lex* or of local custom could not be used as precedent to modify the *lex*.[64] It seems likely that the notion of good faith underlying this type of agreement required the *lex* to remain static as explained in a single text from Justinian's Institutes.[65]

Since the term *lex locationis* occurs less frequently in juristic discussions on letting and hiring, a small number of conclusions can be drawn from the texts on the matter. First, like the *conductor*, the *locator* was obliged to

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[62] See D.19.2.13.10 (Ulpian. 32 ad Ed.) and D.19.2.24 pr (Paul. 42 ad Ed.). In both these texts, the noun *lex* is used with the verb *comprehendere*, (to understand) which suggests an examination and interpretation of the provisions of the contract by a jurist or someone learned in legal interpretation.

[63] D.50.8.2 pr (Ulpian. 3 Opin.).

[64] C.4.65.19 (a. 293).

[65] Inst.3.24.5.

observe the terms of the *lex*. Secondly, the *lex* could be written or unwritten.[66] Finally, a number of the texts on the *lex locationis* concerns the interpretation of provisions included in a *lex*.[67]

The issue of whether the *lex* had to be reduced to writing does not appear to have been at the forefront of juristic discussion on letting and hiring in the Digest. Most legal texts are ambiguous as to whether the contract under discussion had been written down and there is but a single text in which explicit mention is made of it.[68] It may well be asked how the terms of the *lex* would have been proven in a court of law if it had not been reduced to writing, but this question cannot be definitively answered given the paucity of evidence. In all probability *bona fides* played a dominant role in this case.[69]

4. Litigation and the Contract of Letting and Hiring

The circumstances leading to litigation on the basis of the contract of letting and hiring are many and varied. In most cases the decision to litigate would have been preceded by a cessation of *consensus* and thus the irretrievable breakdown of the contractual relationship. The following paragraphs provide an overview of the actions available to both *locator* and *conductor* and the scope of their application. As will be shown in subsequent chapters, Roman law developed specialist legal remedies in addition to the main remedies mentioned here to cater for certain scenarios. These will be discussed in the appropriate place.

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[66] See D.19.2.29 (Alfen. 7 Dig.) for an example of a clause from a public-law contract of letting and hiring.

[67] See, for example, D.19.2.24 pr (Paul. 42 ad Ed.); D.19.2.29 (Alfen. 7 Dig.).

[68] C.4.65.9 (a. 234) Emptori quidem fundi necesse non est stare colonum, cui prior dominus locavit, nisi ea lege emit. Verum si probetur aliquo pacto consensisse, ut in eadem conductione maneat, quamvis sine scripto, bonae fidei iudicio ei quod placuit parere cogitur.

It is not necessary for a purchaser of a farm to retain a tenant to whom the former owner let it, unless he bought it with that condition; but if it is shown that he in some manner, though not in writing, agreed that the lease should continue, he will be compelled in an equitable action to comply with the agreement. [Blume translation].

[69] Compare D.19.2.24 pr (Paul. 34 ad Ed.) … nam fides bona exigit, ut arbitrium tale praestetur, quale viro bono convenit. See also D.50.8.3.2 (Ulpian. 3 Opin.) … explorata lege conductionis fides bona sequenda est. Mention is also made in Inst. 3.24.5 … si quid in lege praetermissum fuerit, id ex bono et aequo debet et, si quid in lege praetermissum fuerit, id ex bono et aequo praestare. Compare Von Lübtow, U. "Catos *Leges venditioni et locationi dictae*" 1956 *Eos* (48-3), 277–441, 377–441.

The main actions arising from the contract of letting and hiring was the *actio locati* available to the *locator* and *actio conducti* available to the *conductor*. Both were classified according to Justinian's Institutes as personal actions, which were restorative in purpose and which were founded on good faith.[70] Elsewhere in the Digest, they are described as named actions which derived their appellation from the contract itself.[71] Although Justinian's Institutes falls outside the period under discussion, these statements provide a succinct summary of the main hallmarks of these two actions in the period under investigation. Both actions were personal in the sense that the contract of letting and hiring formed part of the law of obligations. At the core of this branch of law lay the notion of a personal obligation which could only be enforced between a specific creditor and debtor. The main purpose of these two actions was to remedy the breach. As will be shown below, this usually involved claiming an amount of money (either *id quod interest* or repayment of rent paid in advance depending on the presence or absence of fault), but other forms of legal relief were also available.[72] The good faith element of these actions will be explored in greater detail below.[73]

Certain introductory remarks about the *formula* of these actions are required. Kaufmann, in his analysis of the prehistory of the contract of letting and hiring, demonstrated that the *formula* was probably preceded first by one of the actions-at-law and thereafter by a *stipulatio* before the consensual contract of letting and hiring was created in the second century BCE.[74] Since this period falls outside the scope of this book, these early forms of procedure will not be investigated. Rather, the *formula* of the developed contract as visible in the legal sources of the classical period will be investigated. Lenel[75] reconstructed the *formula* of two actions in the following manner:

> The *actio locati*
>
> Quod Aulus Agerius Numerio Negidio fundum (opus faciendum, operas) quo de agitur locavit, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret, absolvito.

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70 Inst. 4.6.17, 28.

71 D.2.14.7.1 (Ulpian. 4 ad Ed.).

72 See C.4.65.2 (a. 213) for a typical monetary claim. Compare C.4.65.17 (a. 290).

73 See most recently and comprehensively Talamanca, M. "La 'bona fides' nei giuristi romani: 'Leerformel' e valori dell'ordinamento" in *Il ruolo della buona fede oggettiva nell'esperienza guiridica storica e contemporanea* IV (Padova 2003), 1–312.

74 Kaufmann, *Die altrömische Miete*, §§ 74–84.

75 Lenel, O. *Das Edictum Perpetuum* 3rd improved ed. (Leipzig 1927), 299–300.

> Whereas the plaintiff (Aulus Agerius) let the *fundus* (the *opus faciendum, operae*) in question to the defendant (Numerius Negidius), whatever on that account the defendant ought to do or to give the plaintiff *ex fide bona*, oh judge, condemn the defendant to the plaintiff, and if not, absolve him.
>
> [Own translation]

> The *actio conducti*
>
> Quod Aulus Agerius de Numerio Negidio fundum (opus faciendum, operas) quo de agitur conduxit, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret, absolvito.
>
> Whereas the plaintiff (Aulus Agerius) rented the *fundus* (the *opus faciendum, operae*) in question from the defendant (Numerius Negidius), whatever on that account the defendant ought to do or to give the plaintiff *ex fide bona*, oh judge, condemn the defendant to the plaintiff, and if not, absolve him.
>
> [Own translation]

While the gist of this reconstruction is correct, some elements remain controversial. In his 1999 book, Fiori, following Kaufmann, pointed out that Lenel had changed the wording of the *formula* in the second edition of his work on the Praetorian Edict which appeared in 1907.[76] The first edition of this work, published in 1883, had followed Rudorff's reconstruction of the *formula* and contained only two subdivisions within the contract (*fundus* and *operae*). Lenel introduced the threefold subdivision (*fundus, opus faciendum* and *operae*) into the 1907 edition to reflect the (then) prevailing Pandectist view on the threefold subdivision within the contract of letting and hiring. In light of Fiori's analysis about the structure of the contract a twofold division (*fundus*/*operae*) will be used in this book.

The *formula* presented here is generic and could be adapted by the parties to suit a variety of individual commercial transactions classified as letting and hiring. Certain features of this stock *formula* deserve comment. From the *demonstratio* it would appear that the existence of the contract was a factual matter. Much would have depended on the nature and complexity of the commercial transaction and the existence of documentary evidence of the contract recorded in the *lex contractus*. It is presumably also at this point (before the Praetor) that matters of contractual capacity would have been raised. The *formula* also required the parties to to provide further detail about the nature and content of the agreement as is evidenced by the

76 Fiori, *Locatio conductio*, 313.

use of the phrase ... *qua de re agitur*. Again, the level of complexity of the contract would have dictated the amount of detail included in this part of the *formula*.

The stock *formula* does not mention the rental price (though in all likelihood it will have been included in the description of the content of the agreement). Kaufmann has suggested that the reason for this lies in the historical predecessors of the *formula* for the contract of letting and hiring.[77] The *formula* is for an *incertum* which leaves it to the discretion of the *iudex* to decide on an amount which is fair and reasonable in the circumstances taking *bona fides* into account. Finally, it is worth noting that in the formulary system, a *iudex* could only order *condemnatio pecuniaria*. Thus, the *iudex* could only condemn the losing party to an amount of money which, according to the discretion of the *iudex*, was sufficient to remedy the breach.[78] This amount was usually expressed as *id quod interest* where fault was present.[79] Since the majority of legal texts under discussion in this book reflect classical Roman law when the formulary process was slowly being superceded by the *cognitio*, texts in which the *cognitio* appear to have been used will be highlighted specifically.

Both the *actio locati* and the *actio conducti* required proof of fault. To understand the meaning of this term in context, certain observations about "liability" and "risk" are required.[80] Most textbook accounts of the contract of letting and hiring in classical Roman law address the issues of "liability" and "risk" separately and in the following manner.[81] The term "liability" is used to convey the idea that for the actions (*actiones locati et conducti*) arising from the *formula* of letting and hiring to be available to the pursuer, it had to be proven in a court of law that the behaviour of the defendant which constituted the breach amounted to either *dolus* or *culpa*. The term "risk", on the hand, is used to convey the outer limits beyond contractual liability. Where the financial loss arising from breach of contract cannot be attributed to the *dolus* or *culpa* of either party to the contract, but occurred owing to an unforeseen and uncontrollable event (usually described as *vis maior* or *casus fortuitus*), the loss could not be legally attributed to

[77] Kaufmann, *Die altrömische Miete*, § 84.

[78] See Berger, *Encyclopedic Dictionary*, entry on *sententia*.

[79] Costa, *La locazione di cose*, III § 3.

[80] For a more expansive discussion, see Du Plessis, P.J. "'Liability', 'Risk' and *locatio conductio*" in *Modelli teorici e metodologici nella storia del diritto privato* IV (Naples 2012), 1–37 on which this discussion is based.

[81] See, for example, Kaser, M. *Römisches Privatrecht*, 17th ed. (by Knütel, R.) (Munich 2003), § 42.

the behaviour of the one of the parties. In these circumstances, the legal order developed a series of "hard rules" which divided/assigned the financial loss arising from the unforeseen and uncontrollable event between the parties to the contract (thereby expanding liability).[82] Thus, "liability" was concerned with the financial loss resulting from the actions or omissions of the parties and was broadly based on the notion of "fault", whereas "risk" was concerned with financial loss arising from external uncontrollable events and was unconnected to the idea of "fault".

While it cannot be denied that this approximation of the notions of "liability" and "risk" in letting and hiring is broadly correct from a modern dogmatic perspective, it also masks a number of complexities. First, it creates the impression that concepts such as *dolus* and *vis maior* were technical legal terms used by the Roman jurists to refer to clearly defined conceptual categories which were employed in a deductive manner to draw conclusions of law based on a specific set of facts.[83] Since it is increasingly becoming apparent that the Roman jurists did not reason using definitions (according to our modern understanding of the term) and did not always use deductive logic in their reasoning,[84] these long-held assumptions must now be reassessed.[85] In second place, although the notions of "liability" and "risk" have been discussed at length in Romanist literature, few studies have examined these concepts in tandem to ascertain whether and to what extent the development of one may have influenced the development of the other.

As a rule, there are two types of academic contribution to the study of concepts such as "liability" and "risk" in Roman law. On the one hand there are "macro-narratives" which set out to chart the historical "development" of a concept such as "risk" more generally, while on the other hand there are studies which focus on the operation of these concepts within specific contracts and present the reader with a "micro-narrative". While

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82 These rules were of a dispositive nature and could be varied by agreement between the parties.

83 This point of view became dominant in German legal scholarship during the nineteenth century, see Cardilli, R. *L'Obbligazione di 'praestare' e la responsabilità contrattuale in diritto romano* (II sec. A.C.–II sec. D.C.) (Milan 1995), 19–20.

84 See Stein, P.G. *The Roman jurists' conception of law*, 1–30 as well as Jakab, *Risikomanagement*, 209.

85 Calls for the reassessment of these terms have been made by, to name but a few, Frier, B.W. "Tenant's Liability for Damage to Landlord's Property in Classical Roman Law" 1978 *ZSS* (rA) (95), 232–269, 232; MacCormack, G. "*Dolus, Culpa, Custodia* and *Diligentia*. Criteria of Liability or Content of Obligation?" 1994 *Index* (22), 189–209, 189; Cardilli, *L'Obbligazione di 'praestare'*, 236 and Jakab, *Risikomanagement*, 199–203.

both of these types of study are based on the same textual evidence, they often approach the matter from very different perspectives and arrive at different conclusions. The aim of this section is to attempt to integrate the "macro-narratives" surrounding the history of "liability" and "risk" in Roman contract law with the "micro-narrative" studies in relation to the contract of letting and hiring. This section will therefore necessarily focus on those works which have contributed most to the discussion of "liability" and "risk" in general and with specific reference to letting and hiring such as MacCormack, Frier and Fiori.[86] In general, for each section, the "macro-narrative" will be set out first. This will be followed by a survey of the texts followed by an attempt to integrate the different narratives.

Let us start with the "macro-narrative" regarding "liability" in the Roman law of contracts. At the outset it should be mentioned that Roman law seemingly did not have a word to denote contractual "liability" in an abstract sense.[87] Instead, terms such as *dolus* and *culpa* were merely used to describe circumstances where the actions were available, thereby giving content to the notion of contractual "liability" in the modern sense.[88] In an insightful study, MacCormack argued that was incorrect to refer to concepts such as *dolus* and *culpa* as "standards or criteria of liability" in the context of the Roman law of contracts.[89] They were not viewed in this manner by the Roman jurists nor did they represent "objective standards" against which the conduct of the defendant was assessed. Instead, MacCormack argued that these concepts never quite reached the stage of abstract "standards/criteria" in the classical period despite a gradual evolution in juristic understanding of these concepts which occurred within the broader context of the Roman law of contracts. MacCormack presents an "evolutionary" model of the history of these concepts. Within the realm of the *bonae fidei* contracts such as letting and hiring, *dolus* and *culpa* initially (in the earliest

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[86] Fiori, *Locatio conductio*, 285–304.

[87] On contractual liability in Roman law generally, see De Robertis, F. *La responsabilità contrattuale nel sistema della grande compilazione* 2 vols. (Bari 1981–1982); Cannata, C.A. "La responsabilità contrattuale" in *Derecho romano de obligaciones* (Madrid 1994), 143–178; Cannata, C.A. *Sul problema della responsabilità nel diritto privato romano* (Catania 1996); Cannata, C.A. *Ricerche sulla responsabilità contrattuale nel diritto romano* (Milan 1966); Molnár, I. *Die Haftungsordnung des römischen Privatrechts* (Szeged 1998); Ankum, H. "La responsabilità contrattuale nel diritto romano classico e nel diritto giustinianeo" in *Diritto romano e terzo millennio* (Naples 2004), 135–152.

[88] On this see more generally Pastori, F. "Annotazioni sulla relazione tra contratto e responsabilità" in *Studi Cesare Sanfilippo* VI (Milan 1985), 611–628. See also Jakab, *Risikomanagement*, 153 regarding the dogmatic use of Roman legal sources in modern scholarship.

[89] MacCormack, 1994 *Index* (22), 189–209, 189.

period) formed part of the reciprocal contractual obligation at the heart of the contract itself and were not identified as such. As time went by, these two concepts were separated from the contractual obligation until, by the time of Ulpian in the mid-third century CE, they had come to express the idea of "liability" in a general sense.[90] It is important to remember, however, as Frier has pointed out, that even by this time, terms such as *culpa* did not represent a completely "abstract standard of liability" and remained closely linked to fact-based scenarios.[91] Much remains unclear about the reasons for this development, but Fiori has recently suggested that this gradual development in Roman juristic thought regarding notions of "liability" was in some way connected to the change in civil procedure from formulary to the *cognitio* which occurred during the classical period.[92] This change brought about a more bureaucratic legal process which could not make use of the adaptable Praetorian law post. 130 CE when the Praetorian Edict was redacted into its final form by order of Hadrian. This in turn brought about a gradual change from a law dominated by procedure to one dominated by substance and it seems highly likely that such a change led to greater conceptual thinking about issues such as liability.

Let us now test this "macro-narrative" about "liability" against the textual evidence. *Dolus* will be treated first.[93] A chronological approach will be

90 MacCormack, 1994 *Index* (22), 189–209, 197–198.

91 Frier, 1978 *ZSS* (rA) (95), 232–269, 242. Jakab, *Risikomanagement*, 44 states that contractual risk was based on "daily commercial practice" and to understand it one must look wider than merely the law.

92 This section was inspired by an idea originating from a paper given by Fiori, R. "The rise and fall of the specificity of contract" (paper delivered in Oxford on 29 March 2011 and Edinburgh on 12 August 2011). While Professor Fiori's paper focused solely on the notion of "specificity", it my belief, from a reading of C.257.1 (a 342) that the change in civil procedure had a more profound effect on Roman conceptual thought relating to contract than previously realised. I intend to return to this in an article.

93 On the probable origins of *dolus*, see Molnár, *Haftungsordnung*, 48–55. A survey of the *OLD* (Oxford Latin Dictionary) provides a particularly detailed account of the occurrence and meaning of the term in the Latin language. It shows that *dolus* is a word which can already be found in the works of Plautus and means in legal terms: "guile, fraud, deceit" (*OLD*, 607). This can also be seen in the famous definition of the term provided by the Augustan jurist Labeo in D.4.3.1.2 as "any cunning, deceit or contrivance used to defraud, deceive or cheat another." translated by Berger, *Encyclopedic Dictionary*, 440. See also generally MacCormack, G. "Juristic Use of The Term *dolus*: Contract" 1983 *ZSS* (rA) (100), 520–532. See most recently, Lambrini, P. *Dolo generale e regole di correttezza* (Pavia 2010). On *dolus* and its role in the *actio de dolo*, see generally Brutti, M. *La problematica del dolo processuale nell'esperienza romana* 2 vols. (Milan 1973); Caminas, J.G. "La problematica del dolo en el derecho romano clasico" in *Derecho romano de obligaciones* (Madrid 1994), 945–975 and most recently, Cursi, M. *L'eredità dell'actio de dolo e il problema del danno meramente patrimoniale* (Naples 2008).

followed, using the mid-second century BCE (c. 150 BCE) as the most plausible date of inception of the contract of letting and hiring as a *iudicium bonae fidei*.

There are ten texts which discuss the notion of *dolus* in relation to letting and hiring. These are spread out over the first three centuries CE. Let us take the first century CE as our starting point. Two texts provide us with information of this period. The first of these is the famous text of the rented muleteer, D.19.2.60.7 and the second is a case of lease-back connected to the sale of land, D.18.1.68 pr.[94] Given considerations of space, I will only cite the first text:

> D.19.2.60.7 (Lab. 5 Post. a Iavoleno Epit.) Servum meum mulionem conduxisti: negligentia eius mulus tuus perit. Si ipse se locasset, ex peculio dumtaxat et in rem verso damnum tibi praestaturum dico: sin autem ipse eum locassem, non ultra me tibi praestaturum quam dolum malum et culpam meum abesse: quod si sine definitione personae mulionem a me conduxisti, et ego eum tibi dedissem cuius negligentia iumentum perierit, illam quoque culpam me tibi praestaturum aio quod eum elegissem qui eiusmodi damno te adficeret.
>
> You hire my slave, a mule-driver, and your mule is killed through the man's neglect. If the slave had hired out his own person himself, I am sure that I should only have to make good the damage on the footing of the *actio ex peculio et in rem verso*, but if it was I who let him out, my obligation goes no further than answering for the absence of *dolus malus* or negligence on my own part; if however you simply engaged for some mule-driver or other, not saying who, and I let you have a man by whose *negligentia* [my own amendment] the animal was killed, then I agree that my responsibility would extend to the negligence I was guilty of in choosing a slave who caused you the loss in question. [Monro translation][95]

It is not my intention to engage with the central issues in either of these texts as they have been thoroughly discussed (in the case of D.19.2.60.7 by Martin, for example) and will be discussed in later chapters.[96] Instead, I will solely focus on the meaning of *dolus* in these texts. In the first text, which is highly

[94] D.18.1.68 pr (Proc. 6 Epist.) Si, cum fundum venderes, in lege dixisses, quod mercedis nomine a conductore exegisses, id temptori accessurum esse, existimo te in exigendo non solum bonam fidem, sed etiam diligentiam praestare debere, id est non solum ut a te dolus malus absit, sed etiam ut culpa.

If, in selling land, you include an express term that what you get as rent from a tenant of the land shall go to the purchaser, I am of the opinion that you have not merely to show good faith in collecting the rent but also diligence, that is, you are liable not only for fraud but also for negligence. [Watson translation].

[95] Monro, C.H. *Digest XIX.2. Locati conducti—translated with notes* (Cambridge 1891).

[96] Martin, S.D. "*Servum meum mulionem conduxisti*: Mules, Muleteers and Transportation in Classical Roman law" 1990 *TAPhA* (120), 301–314.

significant given the "definition" of *dolus* by Labeo and his importance in the development of the *actio doli*, *dolus* is used in a negative sense. The party to a contract has to execute the contract in a certain manner (presumably in accordance with good faith—the underlying idea in letting and hiring). In Labeo's view, proper execution of the contract signifies an "absence of *dolus*". From this, one may deduce that *dolus* is the counterpoint to good faith. This is even more clearly expressed in the second text by Proculus where, in a rather clever fashion two sets of terms (*bona fides* and *diligentia*) are contrasted with *dolus malus* and *culpa* respectively. It is clear from these two texts than in the first century CE *dolus* in the context of the contract of letting and hiring meant nothing more than the complete absence of good faith.[97]

There are two texts from the second century CE in which the term *dolus* is mentioned in connection with letting and hiring. The texts in question are D.47.2.62.5[98] and D.13.6.5.15 (citing Celsus filius).[99] Little can be taken from these two texts on the meaning of *dolus* in the contract of letting and hiring during the second century CE. This may be because the references are mostly second-hand, but even if they are taken to reflect accurately the state of the law during the second century CE it seems that hardly anything has changed in relation to *dolus* and letting and hiring. If anything, these texts

97 MacCormack, 1994 *Index* (22), 189–209, 206; Talamanca, *Bona fides*, 305. For an opposing view, see De Bernardi, M. "A proposito della pretesa contraposizione concettuale tra 'dolus' e 'bona fides' nel linguaggio dei giuristi" in *Atti del seminario sulla problematica contrattuale in diritto romano* II (Milan 1990), 129–171.

98 D.47.2.62.5 (African. 8 Quaest.) … [E]t sicut in superioribus contractibus, venditione locatione pignore, dolum eius qui sciens reticuerit puniendum esse dictum sit, ita in his culpam eorum quorum causa contrahatur ipsis potius damnosam esse debere. …

… [S]o that, just as it was held in the previous cases, viz. sale, hire and pledge, that the deliberate ill-practice of a man who keeps back information in his possession ought not to be unpunished, so in this case the negligence of a person who is to enjoy the whole benefit of the contract ought to prejudice himself only and not the other party. … [Monro translation].

99 D.13.6.5.15 (Ulpian. 28 ad Ed.) Si duobus vehiculum commodatum sit vel locatum simul, Celsus filius scribit libro sexto digestorum quaeri posse, utrum uniusquisque eorum in solidum an pro parte teneatur. … Sed esse verius ait et dolum et culpam et diligentiam et custodiam in totum me praestare debere: quare duo quodammodo rei habebuntur et, si alter conventus praestiterit, liberabit alterum et ambolus competit furti actio,

If a vehicle is lent or hired to two people together, Celsus the Younger, in the sixth book of his Digest, writes that it is a question whether each is liable for the whole or for a share. … [T]he more correct view is, he says, that I must be liable for the whole amount in respect of wilful conduct, fault, care, and safe-keeping. Hence, the two will in a sense both be considered principals, and if one performs the agreement, he will discharge the other. Also the action on theft will lie at the instance of the other one. [Watson translation].

seem to show that the term has acquired a general meaning that does not require explanation (as in the texts of the first century CE).

There are five texts from the third century in which the term *dolus* is mentioned in connection with letting and hiring. The first of these, D.19.2.24 pr[100] is concerned with the completion of a task, while a further three by Ulpian, D.19.2.9 pr,[101] D.13.6.5.2[102] and D.50.17.23[103] deal with diverse matters including the lease of a piece of land and more general statements about "liability". The final text is an Imperial rescript dated 294 CE, C.4.65.28 in which "liability" in terms of the contract of letting and hiring is set out. For reasons of space, only this text will be cited:

> C.4.65.28 (a. 294) Tusciano Neoni. In iudicio tam locati quam conducti dolum et custodiam, non etiam casum, cui resisti non potest, venire constat.
>
> In cases of letting and hiring, account is taken of fraud and want of care in guarding the property, but not of accidents which could not be obviated. [Blume translation][104]

Much like those texts from the second century CE, these five from the third century CE do not contribute much to our understanding of the meaning of *dolus* in relation to letting and hiring. If anything, they suggest that little has changed. *Dolus* appears to have a well-defined meaning and is applied in the context of the contract to denote the idea of "liability".

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100 D.19.2.24 pr (Paul. 32 ad Ed.) … Quibus consequens est ut irrita sit adprobatio dolo conductoris facta, ut ex locato agi possit.

… It follows than an approval of the work procured by fraudulent manoeuvres on the part of the contractor is of no force, and accordingly the employer will have an action on the contract. [Monro translation].

101 D.19.2.9 pr (Ulpian. 32 ad Ed.) Si quis domum bona fide emptam vel fundum locaverit mihi isque sit evictus sine dolo malo culpaque eius, Pomponius ait nihilo minus eum teneri ex conducto ei qui conduxit, ut ei praestetur frui quod conduxit licere.

If the bona fide purchaser of a house or land lets it, and the true owner discovers it without any collusion or negligence on the lessor's part, Pomponius holds that the latter is still liable to an action on the contract on the part of his lessee to compel him to procure him the power of enjoying what he hired. … [Monro translation].

102 D.13.6.5.2 (Ulpian. 32 ad Ed.) … Sed ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate, et dolus et culpa praestatur.

… On the other hand, where, as in sale, hire, dowry, pignus, and partnership, the interest of each party is advanced, liability is for both wilful conduct and for fault. [Watson translation].

103 D.50.17.23 (Ulpian. 29 ad Sab.) … Dolum et culpam mandatum, commodatum, venditum, pignori acceptum, locatum, …

… Mandate, loan for use, sale, acceptance in pledge, hire, likewise grant of a dowry, grant of tutelage, unauthorized administration involve bad faith and culpability; and, indeed, among these we include diligence. … [Watson translation].

104 Blume, F. *Annotated Justinian code* (http://uwacadweb.uwyo.edu/blume&justinian/) (last accessed 21 October 2011).

Having surveyed both the "macro-narrative" and the texts themselves, we may now proceed towards an attempt at synthesis. MacCormack's account of the development of "liability" proposes that (at least initially) the concept of *dolus* formed part of the reciprocal obligation at the heart of the contract. None of the texts from the first century CE mentioned above can be used as evidence of this earliest phase as the earliest text shows that the notion of *dolus* has already separated from the reciprocal obligation. This does not mean that MacCormack's hypothesis is incorrect, since another text provides evidence as to the likely period in which *dolus* separated from the contractual obligation. In the *Tabula Heracleensis* (*Lex Iulia Municipalis*) of c. 45 BCE *dolus malus* is clearly mentioned in connection with letting and hiring (albeit in a public-law context).[105] It is not necessary to delve once more into the possible origins of the contract of letting and hiring as these have already been examined. Suffice it to say that the passage from the *Tabula Heracleensis* proves that at a relatively early stage in this history of the contract of letting and hiring in private law, the concept of *dolus* was present and had become sufficiently stable for it to be used in legislation which had to be interpreted even by those without legal training. This is hardly surprising since the concept would have been familiar to the jurists based on its emergence earlier in other areas of law such as the delict of wrongful damage to property.

Three further points deserve mention. The first is the meaning of the term *dolus*. In the earliest phase of its development, MacCormack surmised that *dolus* was not distinguished from the reciprocal obligation at the centre of the contract. This means that the origin of this term must lie in the essential character of the obligation itself. In the consensual contracts, this was *bona fides*. In executing the contract, both parties had to behave in accordance with *bona fides*. *Dolus* thus referred to a clear absence of *bona fide* behaviour in terms of the contract.[106] None of the texts listed above suggest any change in the meaning of the term. In fact, compared to *culpa* (below) there appears to be remarkably little juristic discussion regarding *dolus* in the context of letting and hiring. This suggests that from a relatively early point in the history of the contract, *dolus* as an element of "liability" had stabilised and had become uncontroversial. Secondly, it may well be asked whether the change from formulary to *cognitio* procedure affected the meaning of *dolus*. The texts listed above do not suggest much of a change

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105 Bruns, C. (ed.) *Fontes iuris romani antiqui* 5th ed. (Freiburg im Breisgau 1887), 105 [§ 75]. It has to be said that the words "sine dolo malo" are read into a *lacuna* in the text.

106 MacCormack, 1994 *Index* (22), 189–209, 195.

although it would seem that from the time of Pomponius in the mid-second century CE to Ulpian in the first half of the third century CE there appears to be more of an emphasis on the notion of *dolus* as expressing the notion of "liability". This would be compatible with the changes in civil procedure which occurred during the second century CE when the *cognitio* became the standard procedure in Roman courts. One final point to note is that none of the texts listed above mention *dolus* in connection with anyone other than the parties to the contract. The term is not mentioned when referring to the actions or omissions of slaves or dependants of the parties which might result in breach of contract. This might be more significant than it appears at first glance. If *dolus* only ever meant a clear absence of *bona fides*, it suggests that it was linked in some way to the personal nature of the obligation and thus that only the *locator* or *conductor* (as opposed to their slaves or children-in-power) could act or fail to act in that manner in the context of the contract. This might explain why the concept of *dolus* does not appear to undergo much of a change even though the system of procedure evolved from one which favours procedure to one which focuses on substantive law.

Unlike *dolus*, *culpa* has a more complex history in the context of the Roman law of contracts.[107] As mentioned before, for much of the classical period, the concept of *culpa* was still developing.[108] Even towards the end of the classical period it still cannot be said that the term *culpa* (in the context of the contract of letting and hiring) had acquired a completely abstract meaning.[109] It is impossible to determine when *culpa* first appeared in relation to the contract of letting and hiring given the state of the evidence. Frier, in his analysis of the "liability" of the tenant in classical Roman law proposed that the concept developed in three phases.[110] During the first

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[107] The entry in the *OLD* on *culpa* indicates that the word is of some antiquity and can be found in the works of Plautus. It is translated as "crime, fault, blame, failure, defect" (488). The works of Cicero seems to have been very influential in defining this term. Berger, *Encyclopedic Dictionary*, 419 defines *culpa* as: "(In contractual relations) a negligence on the part of the debtor who failed to foresee the consequences of behavior with regarded to the performance of his duties assumed in the contract." The notion of foreseeability is perhaps somewhat unfortunate in the context of this definition.

[108] "The responsibility of the debtor for his *culpa* is not settled in a uniform way for all kinds of contract. There is no general rule in this respect, although some underlying ideas are not lacking, such as in contractual relations governed by good faith (*bona fides*)."—Berger, *Encyclopedic Dictionary*, 419. See more recently Cannata, C.A. "Una casistica della colpa contrattuale" 1992 *SDHI* (58), 413–432.

[109] Frier, 1978 *ZSS* (rA) (95), 232–269, 242. See also Molnár, *Haftungsordnung*, 58–63.

[110] Frier, 1978 *ZSS* (rA) (95), 232–269, 242.

phase, the jurists did not identify *culpa* as a distinct concept, but merely identified specific scenarios under which the tenant would be rendered "liable" in terms of the contract.[111] Phrased differently, to use the language of MacCormack, it would have been during this early phase that *culpa* still formed part of the reciprocal obligation at the heart of the contract and had not yet separated from it. If discussions over the development of *culpa* in delict (with reference to the *Lex Aquilia*) are any indication, it may be surmised, albeit tentatively, that this phase would have involved some debate over the boundaries of the notion of *dolus*.

Our earliest evidence about *culpa* in relation to the contract of letting and hiring is visible in the works of jurists spanning the first century BCE to roughly the end of the first century CE.[112] There are five texts from this period. Of these, two (D.19.2.60.7 and D.18.1.68 pr) have already been mentioned in relation to *dolus* (and in the case of D.18.1.68 pr Proculus contrasted *diligentia* and *culpa*). The remaining three are D.19.2.31,[113] D.19.2.13.8 (citing Labeo and Mela)[114] and D.9.2.27.11. For reasons of space, only this text will be cited:

> D.9.2.27.11 (Ulpian. 28 ad Ed.) … Sed haec ita, si culpa colonus careret: ceterum si noxios servos habuit …

111 For an anthropological analysis of the origins of *culpa*, see MacCormack, 1994 *Index* (22), 189–209, 191, 193.

112 Cardilli, *L'Obbligazione di 'praestare'*, 233.

113 D.19.2.31 (Alfen. 5 Dig. a Paulo Epit.) … Sed si ita datum esset ut simili re solvi possit, conductorem culpam dumtaxat debere (nam in re quae utriusque causa contraheretur, culpam deberi,) neque omnimodo culpam esse quod uni reddidisset ex frumento, quoniam alicui primum reddere eum necesse fuisset, tametsi meliorem eius condicionem faceret quam ceterorum.

… If then the terms on which the goods were handed over were such that performance could be made in kind, the carrier's liability did not go beyond avoiding negligence, (so much only being required in a case where both parties were to be benefited,) and it did not follow he was guilty of negligence because he made restoration to one in particular out of the common store, seeing that he could not help serving some one or other first, however much he might put that one in a more advantageous position than the others by doing so. [Monro translation].

114 D.19.2.13.8 (Ulpian. 28 ad Ed.) Si quis mensuras conduxerit easque magistratus frangi iusserit, si quidem inquae fuerunt, Sabinus distinguit utrum scit conductor an non: si scit, esse ex locato actionem, si minus, non. Quod si aequae sunt, ita demum eum teneri si culpa eius id fecit aedilis. Et ita Labeo et Mela scribunt.

A man hires measures, and the magistrate orders them to be broken up. If the measures were incorrect, Sabinus makes a distinction turning on the question whether the party who hires them was aware of this fact or not; if he was, he is liable on the contract, otherwise not. But if the measures were correct, the hirer is only responsible in case it was owing to negligence of his that the aedile acted as he did. [Monro translation].

> ... But the position is thus only if the tenant farmer was free of fault. On the other hand, if he had culpable slaves, he will be liable for resulting harm by reason of having such slaves. ... [Watson translation]

These three cases all contain vivid sets of facts and it is clear that much of the reasoning is based on these facts rather than on matters of principle. This suggests a more recent and emerging category where the jurists still feel it important to relate the facts to the reasoning. The final text (cited) shows that vicarious liability for slaves of the tenant is already a topic of discussion at this stage. As mentioned before, the term *dolus* is never mentioned in connection with the actions of slaves or sons-in-power. It may well be that the use of slaves and sons-in-power in relation to the contract of letting and hiring was in some way related to the development of the notion of *culpa*.

The second phase in the development of the concept of *culpa* as identified by Frier occurred roughly during the course of the second century CE. This phase, although mostly still dominated by decisions based on specific set of facts, witnessed a gradual realisation by the Roman jurists that the unifying element underlying these decisions based on facts was the notion of *culpa*.[115] Three texts provide information about this period, but only two will be cited as one (D.4.9.3.1) has already been mentioned before. The two texts in question are D.19.2.19.2 and D.19.2.25.7.

> D.19.2.19.2 (Ulpian. 32 ad Ed.) ... Quod si culpa coloni quod eorum corruptum sit, ex locato eum teneri. ...
>
> ... But if any one of the above things should get into a faulty condition through the tenant's neglect, the tenant is liable on the contract. ...
> [Monro translation]

> D.19.2.25.7 (Gaius 10 ad Ed. Prov.) Qui columnam transportandam conduxit, si ea, dum tollitur aut portatur aut reponitur, fracta sit, ita id periculum praestat si qua ipsius eorumque quorum opera uteretur culpa acciderit: culpa autem abest, si omnia facta sunt quae diligentissimus quisque observaturus fuisset. ...
>
> If a man has engaged for carriage of a column, and in the course of removing, carrying or re-erecting it, the column gets broken, he is only held answerable for the risk if the mischief occurs by some negligence of his own, or of those whom he employed; and there is no negligence if all precautions were taken which any perfectly careful person would have observed ...
> [Monro translation]

[115] Frier, 1978 *ZSS* (rA) (95), 232–269, 234, 237–239. See also MacCormack, 1994 *Index* (22), 189–209, 193.

These texts seem to confirm Frier's hypothesis on the historical development of *culpa*. Although the facts are still important, it is clear that the reasoning is based on principle rather than fact. Furthermore, the statement in the latter text "there is no *culpa* when …" is particularly insightful as Gaius, (like Proculus in D.18.1.68 pr) contrasts *culpa* and *diligentia*.[116]

The final phase in the development of the notion of *culpa* occurred during the third century CE and is visible in a number of texts attributed to Paul and Ulpian. They include D.14.2.10.1 and D.19.2.13.1.

> D.14.2.10.1 (Lab. 1 Pith. a Paulo Epit.) Si ea condicione navem conduxisti, ut ea merces tuae portarentur easque merces nulla nauta necessitate coactus in navem deteriorem, cum id sciret te fieri nolle, transtulit et merces tuae cum ea nave perierunt, in qua novissime vectae sunt, habes ex conducto locato cum priore nauta actionem. Paulus: immo contra, si modo ea navigatione utraque navis periit, cum id sine dolo et culpa nautarum factum esset. …
>
> If you have chartered a ship for the carriage of your cargo and the captain needlessly transships the cargo to a less good vessel, knowing that you would disapprove, and your cargo goes down with the ship when carrying it, you have an action on the charter party against the original captain. PAUL: But not if both ships go down on that voyage, in the absence of intentional or negligent fault on the part of the crew. … [Watson translation]

> D.19.2.13.1 (Ulpian. 32 ad Ed.) Si navicularius onus Minturnas vehendum conduxerit et, cum flumen Minturnense navis ea subire non posset, in aliam navem merces transtulerit, eaque navis in ostio fluminis perierit, tenetur primus navicularius? Labeo, si culpa caret, non teneri ait: ceterum si vel invito domino fecit vel quo non debuit tempore aut si minus idonea navi, tunc ex locato agendum.
>
> A bargeman undertakes to carry a cargo to Minturnae, but his own barge not being able to get up the river, he transships the goods into another, and this latter is lost at the mouth of the river: will the first man be liable? Labeo says, if he was guilty of no negligence, he is not liable; but if he transshipped against the wish of the owner of the goods, or at an improper time, or onto an unserviceable barge, then he is liable to an action founded on the contract. [Monro translation]

It is not my intention to delve into the intricacies of the law set out in these two texts as (in the case of the latter for example) these matters have been

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116 And on this see generally Villey, M. *Esquisse historique sur le mot responsable* in *La responsabilité à travers les âges* (Paris 1989), 75–88; Voci, P. "*Diligentia, custodia, culpa*—I dati fondamentali" 1990 *SDHI* (56), 29–143; De Falco, I. *Diligentiam praestare—ricerche sull'emersione dell'inadempimento colposo delle "obligationes"* (Naples 1991) generally.

recently examined (and will be examined further in subsequent chapters).[117] These two texts represent a number of examples, mostly from texts by Ulpian, in which the notion of *culpa* has clearly become the standard term used to describe the notion of "liability" in terms of the contract of letting and hiring. These two texts also seem to confirm Frier's observation that even during this final phase which represents the late classical period, the notion of *culpa* still was not entirely an abstract notion, but was linked to casuistry.[118]

Two further points need to be made concerning the development of *culpa* in the context of letting and hiring. First, as *culpa* developed in stages in Roman legal thought, the jurists also conceptualised instances of vicarious liability based on *culpa* in letting and hiring alongside it.[119] This development seems to commence at a later stage (roughly during the second phase of the development of *culpa* in the second century CE). Frier has identified four phases in the development vicarious liability based on *culpa* in the contract of letting and hiring.[120] It is noticeable that these phases appear in more rapid succession than the development of the concept of *culpa* itself which suggests that they were connected to mainstream Roman legal thought on *culpa* and drew intellectual inspiration from it.[121] In the first phase, spanning roughly the first half of the first century CE, only a noxal action was available where a slave of one of the contracting parties caused loss.[122] During the second half of the first century, the noxal action was supplemented by a contractual action arising out of letting and hiring, but it remained the prerogative of the party to surrender the slave noxally rather than compensate the loss.[123] This prerogative was lost during the third phase, which roughly corresponds to the end of the first century CE when the party became fully liable *ex contractu* for the loss caused by the slave. The final phase occurred during the late classical period in the works of Ulpian when a party became contractually liable not only for loss caused by slaves, but also for loss caused by freedmen and, in the case of *locatio conductio rei*, guests which had been

[117] Wicke, H. *Respondeat superior—Haftung für Verrigtungsgehilfen im römischen, römisch-holländischen, englischen und südafrikanischen Recht* (Berlin 2000), 71–73.

[118] Frier, 1978 *ZSS* (rA) (95), 232–269, 242. See also MacCormack, 1994 *Index* (22), 189–209 at 197–198.

[119] Wicke, *Respondeat superior*, 107.

[120] Frier, 1978 *ZSS* (rA) (95), 232–269, 258, 262.

[121] Wicke, *Respondeat superior*, 50 points out that much surrounding the development of vicarious liability is based on casuistry and that it is difficult to uncover any general principles in this regard.

[122] Wicke, *Respondeat superior*, 42–49 for a survey with literature.

[123] Wicke, *Respondeat superior*, 55–61, 57.

admitted into the rented property.[124] Frier points out, however, that much regarding this final phase remains unclear and that it cannot be determined whether this constituted a general rule.[125]

The final point to examine is the relationship between the development of the concept of *culpa* in the contract of letting and hiring and the three phases of conceptual legal thought concerning the contract itself as identified by Fiori. Roman legal thought on letting and hiring developed in three phases. The first phase, covering the period from the inception of the contract as a *iudicium bonae fidei* (c. 150 BCE) to the end of the Republic was dominated by Servius Sulpicius Rufus and his followers. They focused on establishing the notion of a reciprocal obligation (*merces—res/operae*) which existed at the heart of the contract and the extent to which the constituent parts of this obligation had to exist in equilibrium.[126] The second phase of legal thought, which spanned roughly the first century of the Principate, witnessed amongst others Labeo and Javolenus exploring the extent of the parties interests in relation to their contractual obligations, while the final phase, represented by the last two centuries of the classical period, saw various jurists (notably Ulpian), exploring the boundaries of the contract in relation to (amongst other things) established *negotia*.

When this scheme is superimposed upon Frier's analysis of the phases of development of the notion of *culpa* in letting and hiring, new perspectives emerge. First, as mentioned before, during the first phase in the development of conceptual thought on the contract of letting and hiring, that is the period spanning the inception of the contract to the end of the Republic, *dolus* and *culpa* did not have separate independent meanings and merely formed part, as MacCormack has suggested, of the obligation itself. It seems safe to assume that *dolus* emerged before *culpa* and probably during this period (though before the time of Servius Sulpicius Rufus). This explains why *dolus* acquired the meaning of "absence of good faith", a meaning which it retained throughout the classical period. Given the notion of the personal nature of the obligation, this might also explain why *dolus* is only ever employed with reference to the actions or omissions of one of the parties to the contract rather than their slaves or dependents. The second phase in the conceptual development of letting and hiring, which occurred roughly in the period spanning the first century CE, is most interesting. Fiori has shown that it was during this period that the Roman jurists explored the extent of

124 Wicke, *Respondeat superior*, 58–59.

125 Frier, 1978 *ZSS* (rA) (95), 232–269 at 262. Echoed by Wicke, *Respondeat superior*, 60–61.

126 See also Cardilli, *L'Obbligazione di 'praestare'*, 59.

the parties' interests in relation to their contractual obligations under the contract. Arguably such an intellectual climate would also be conducive to more systematic thought about the notion of *culpa*. As Frier has shown, statements on *culpa* in letting and hiring remain mostly casuistic during this period, but with a gradual move towards the recognition of *culpa* as the unifying factor. It is also worth noting that this development went hand in hand with the first phase of legal thinking about vicarious *culpa* in relation to the slaves of the parties to the contract. The final phase in the development of conceptual thought about letting and hiring, which occurred in the second and third centuries CE, was characterised by juristic interest in the perimeters of the contract of letting and hiring in relation to other *negotia*. Such thinking about the contract (especially in the context of the *cognitio* procedure) would sit well with a clearly defined notion of *culpa*. This would also account for the developments which occurred in relation to vicarious *culpa* in relation to slaves and freedmen which occurred during the final two centuries of the classical period.

The analysis above has shown that the content of liability (*dolus* and *culpa*) in relation to the contract of letting and hiring remained flexible during the classical period. In light of this conclusion, it therefore seems highly unlikely that the notion of contractual risk did not remain similarly flexible during this period.[127] As this section will demonstrate, "risk" developed alongside "liability" in a casuistic manner.[128]

Before commencing any discussion of "risk" in letting and hiring, certain observations about terminology are required. There are four terms which are commonly associated with "risk" in letting and hiring. These are *periculum*, *vis maior*, *casus* (*fortuitus*) and *vitium*. A modern rendition of "risk" in the Roman contract of letting and hiring employs these terms in the following manner. Under certain circumstances (depending whether the event

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127 MacCormack, G. "*Periculum*" 1979 *ZSS* (rA) (96), 129–172, 168. The standard work on risk in letting and hiring is that of Kaser, M. "*Periculum Locatoris*" 1957 *ZSS* (rA) (74), 155–200. Another important work is that of Molnár, I. "Gefahrtragung beim römischen Dienst- und Werkvertrag" 1975 *Labeo* (21), 23–44. An important recent work on the sister contract, sale, is that of Pennitz, M. *Das periculum rei venditae—Ein Beitrag zum "aktionenrechtlichen Denken" im römischen Privatrecht* (Vienna 2000). See also Alzon, C. "Les risques dans la *locatio-conductio*" 1966 *Labeo* (12), 311–337.

128 Gerkens, J.F. "*Vis maior* and *vis cui resisti non potest*" in *Festschrift Eric Pool* (Pretoria 2005), 109–120, 110. The literature on "risk" in the Roman law of contracts is vast and Gerkens provides a good literature survey. An influential early work on this topic is that of Luzzatto, G. *Caso fortuito e forza maggiore come limite alla responsabilità contrattuale* (Milan 1938), but this work focuses mainly on liability for *custodia*. See most recently Vacca, L. "Sul 'rischio de locatore' nella *locatio conductio rei*" in *Studi per Giovanni Nicosia* VIII (Milan 2007), 305–331.

which caused the circumstances may be classified as *vis maior/casus fortuitus* or *vitium*) one of the parties to the contract bore the *periculum*, that is, the financial loss arising from these events. To put it differently *periculum est locatoris/conductoris* depending on the nature of the events in question. Whether these were "hard rules" and how the "risk" was divided/assigned need not detail us here. Suffice it to say at this point that modern legal thinking treats *periculum* as the overarching umbrella term with which to describe "risk" and assigns a causal connection between the term and the events mentioned above.[129] Phrased differently, *vis maior/casus fortuitus* is the reason why *periculum* rests with one or the other party. As with most things in Roman law, much of this modern rendition of the "risk" regime in letting and hiring relies on the existence of stable and well-defined conceptual categories in law. It assumes a) that the Roman jurists conceived of a conceptual category known as *periculum*, the function of which was to convey certain rules relating to the bearing of "risk"; and b) that within this broad category, two smaller conceptual categories operated namely *vis maior/casus fortuitus* and *vitium*. Let us examine these concepts in turn.

In two insightful articles on the topic, MacCormack investigated the various legal meanings in which the term *periculum* occurs in Roman legal texts.[130] His thorough investigation showed that the term was used in many different meanings in Roman legal texts.[131] He concluded that it could not be said that *periculum* necessarily referred to financial loss which had occurred without "fault". Indeed, sometimes the term was used where fault was present. This hardly seems surprising given the state of modern scholarly thought regarding *culpa* in letting and hiring in classical Roman law. In MacCormack's view, *periculum* meant nothing more than the "chance of loss".[132]

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129 For a good survey of the current debate see Ernst, W. "*Periculum Conductoris*: Eine gleichlaufende Gefahrtragungsregel bei den Verträgen der *Locatio Conductio*" in *Festschrift für Hermann Lange* (Stuttgart/Cologne 1992), 59–97, 94–95 and Müller, C.H. *Gefahrtragung bei der locatio conductio: Miete, Pacht, Dienst- und Werkvertrag im Kommentar römischer Juristen* (Paderborn 2002), 97 and for a review of this work, Ernst, W. "Neues zur Gefahrtragung bei den *Emptio Venditio* und *Locatio Conductio*?" 2004 *ZSS* (rA) (121), 363–378.

130 MacCormack, G. "Further on *Periculum*" 1979 *BIDR* (82), 11–40 and MacCormack, 1979 *ZSS* (rA) (96), 129–172.

A survey of the various meanings of the term in the *OLD* reveals that it can be found as early as the works of Plautus. One of its meanings is that of "risk, hazard, danger, peril." (*OLD*, 1344). Berger, *Encyclopedic Dictionary*, 627 defines it as follows: "A risk, a danger. … In contractual relations *periculum* indicates the risk of loss incurred by one party who expressly assumed a more extensive liability, as, for instance, for damages caused by an accident (*casus*), *periculum praestare*, or by suffering loss under special circumstances. …"

131 MacCormack, 1979 *ZSS* (rA) (96), 129–172, 145.

132 MacCormack, 1979 *ZSS* (rA) (96), 129–172, 171; Molnár, *Haftungsordnung*, 71.

It was not necessarily confined to "loss without fault" (i.e. "risk"). Although very thorough, there are some elements of MacCormack's analysis which may be supplemented in light of more recent scholarly insights on the topic. A number of texts exist in which the term *periculum* is used in connection with the contract of letting and hiring. Let us look at these chronologically.

> D.19.2.60.6 (Lab. 5 Post. a Iavoleno Epit.) Locator horrei propositum habuit se aurum argentum margaritam non recipere suo periculo: ...
>
> The owner of a warehouse gave out that he would not warehouse gold, silver or pearls at his own risk: ... [Monro translation]

> D.19.2.62 (Lab. 1 Pith.) Si rivum quem faciendum conduxeras et feceras antquam eum probares labes corrumpit, tuum periculum est. ...
>
> If you engaged to make a watercourse and made it, but, before you ascertained that it was in accordance with the contract, it was destroyed by an earthquake, you must bear the loss. [Monro translation]

> D.9.2.27.29 (Ulpian. 18 ad Ed.) ... et ideo plerumque artifices convenire solent, cum eiusmodi materiae dantur, non periculo suo se facere ...
>
> ... and accordingly, craftsmen usually contract when things of this sort are entrusted to them that the work shall not be done at their risk ... [Watson translation]

> D.19.2.9.3 (Ulpian. 32 ad Ed.) ... si quidem fortuitus casus incendii causam intulerit, non praestabit periculum locator: ...
>
> ... if a conflagration occurs from some accidental cause, the lessor will not be held responsible ... [Monro translation]

> D.19.2.13.5 (Ulpian. 32 ad Ed.) ... huic sententiae addendum est, nisi periculum quoque in se artifex receperat: tunc enim etsi vitio materiae id evenit, erit ex locato actio.
>
> ... This statement is incomplete [in the former case] without the additional words "unless the workman actually assumed the risk," as, if he did, there will be an action on the contract even if the mischief happened from a flaw in the stone. [Monro translation]

> D.19.2.36 (Florent. 7 Inst.) ... quod vero ita conductum sit ut in pedes mensurasve praestetur eatenus conductoris periculo est quatenus admensum non sit: ...
>
> ... But if the agreement is that the work is to be done in accordance with specific provisions as to form, dimensions, &c. then the risk is borne by the contractor until measurement is made, ... [Monro translation]

The earliest of these is attributed to Labeo and the latest to Ulpian, but the intervening period is not well represented in the sources.[133] Be that as it may, the existing texts do not show any change of meaning between the time of Labeo and that of Ulpian. The term only ever meant the "chance of loss". With that said, there seems to be one further issue worth raising in relation to this term. Of these texts, virtually all use the term in the context of a discussion of a written *lex contractus* which documented a complex contract. It may have been that the term *periculum* had a meaning associated in the minds of the jurists with the *lex contractus* in the sense that it conveyed a larger idea of the contractual "chance of loss", but this is purely speculative. It is clear, however, that it was by no means a technical legal term.

One further point that deserves mention in relation to *periculum* is the link between this term and *vis maior*. Although the modern rendition of the "risk" regime in letting and hiring presents a causal connection between the two concepts, the textual evidence for this is slight. There are only three texts which mentions *vis* and *periculum* together in the context of letting and hiring. The earliest of these, D.19.2.59 is attributed to Iavolenus who cites an opinion of Sabinus.

> D.19.2.59 (Iavolen. 5 Lab. Post.) … Massurius Sabinus, si vi naturali, veluti terrae motu, hoc acciderit, Flacci esse periculum.
>
> … According to Massurius Sabinus, the accident taking place by natural agency, for example, such as described, the loss must fall on Flaccus.
> [Monro translation]

This text is followed chronologically by C.4.65.1, a rescript dated 213 CE in which the phrase *periculum vis maioris* occurs.

> C.4.65.1 Dominus horreorum periculum vis maioris vel effracturam latronum conductori praestare non cogitur. …
>
> The owner of a warehouse is not responsible to the hirer for the risk of an overpowering force or for burglary. … [Blume translation]

The latest, D.19.2.36 is attributed to Florentinus, a jurist of the late classical period and contemporary of Ulpian.

> D.19.2.36 (Florent. 7 Inst.) … si tamen vi maiore opus prius interciderit quam adprobaretur, locatoris periculo est, nisi si aliud actum sit: non enim amplius praestari locatori oporteat quam quod sua cura atque opera consecutus est.

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133 For an extensive analysis of these texts, see Cardilli, *L'Obbligazione di 'praestare'*, 315.

> … If however the work should be destroyed by *vis maior* before the sufficiency is ascertained, the loss falls on the employer for he has no right to claim to be any better off than he would have been if he had used his own diligence and exertions. [Monro translation]

This picture of the relationship between *vis* and *periculum* admits few conclusions. At best it may be said that sometime between the mid-first century CE and the third century CE a conceptual link was made between *periculum* and the notion of *vis*. The wording of the rescript and its dating suggests that this may have occurred before the second century CE.[134]

The notion of *vis maior* in the Roman law of contracts has generated much discussion, primarily within the context of the much-contested issue of *remissio mercedis*.[135] Much of the discussion has centred on the meaning of the term and whether the Roman jurists developed a coherent conceptual category of *vis maior*, the purpose of which was to excuse/enlarge "liability". When the use of the term *vis* is analysed in the context of the contract of letting and hiring, a more complex picture emerges.[136] It is not the intention of this contribution to delve into the murky past of the concept or its likely origins. Suffice it to say that during the earliest period of letting and hiring from its inception c. 150 BCE to the end of the Republic, the concept of *vis* already would have been familiar to the Roman jurists in light of its use in the Praetorian Interdicts (*nec vi, nec clam, nec precario*). It is also clear from accounts of Roman court cases like *Caecina* that legal definitions of the notion of *vis* were still much debated in pre-classical Roman law. Be that as it may, the earliest appearance of the term *vis* in the context of letting and hiring occurs in the celebrated text D.19.2.15.2 where the Republican jurist Servius draws a distinction between *vis* and *vitium*, followed by a list of examples of events which may be classified as either of these two categories.

> D.19.2.15.2 (Ulpian. 32 ad Ed.) Si vis tempestatis calamitosae contigerit, an locator conductori aliquid praestare debeat videamus. Servius omnem vim cui resisti non potest dominum colono praestare debere ait, …

134 MacCormack, 1979 *ZSS* (rA) (96), 129–172, 172.

135 Capogrossi Colognesi, L. *Remissio mercedis* (Naples 2005), 3–106.

136 A survey of the various meanings given to this term in the Latin language reveals that *vis* may be defined as "Hostile strength, force, violence, = βία". The term seems to be commonly used by Cicero. Berger, *Encyclopedic Dictionary*, cit., defines *vis maior* as "Superior force, an accident which cannot be foreseen or averted because of 'human infirmity' (D.44.7.1.4) …". See most recently Sitzia, F. "D.19.2.15.2 *vis maior* e *vitia ex ipsa re*" in *Fides—Humanitas—Ius: studi in onore di Luigi Labruna* VII (Naples 2007), 5211–5227.

> If forcible damage is done by a violent storm, let us consider how far the landlord is bound to indemnify the tenant. Servius holds that he is compellable to make good all forcible damage that cannot be avoided, …
>
> [Monro translation]

Given the complexities surrounding this text, which have been documented in great detail, all that can really be said about *vis* in the context of letting and hiring during the late Republic is that the term does not appear to have had a precise meaning.[137] This is hardly surprising given the flexible meaning of "liability" during this period. It should also be borne in mind that *vis* was a generic term which covered a wide spectrum of concrete events as can be seen from the lists of "acts of God" set out in D.19.2.15.2. There is little evidence of change in the meaning of the term in the first century CE.[138] Information is sparse, but it is worth noting that the celebrated Siebenburger tablets from the end of the first century CE (and continuing into the second century CE), which records the "employment" contract of the worker of a mine, does not use the generic term *vis* at all, but instead prefers to name, what must have been the most common case of *vis* in the context of mining activities, namely catastrophic flooding (… *si fluor impedierit* …).

> … Suas operas sanas valentes edere debebit conductori supra scripto. Quod si invito conductore recedere aut cessare voluerit, dare debebit in dies singulos HS V numeratos … Quodsi fluor impedierit, pro rata computare debebit. …[139]
>
> He shall render his services as those of a healthy workman and valuable to the above-mentioned *conductor*. If he should withdraw or interrupt (his work) against the will of the *conductor*, he shall pay five sesterces for each day, to be counted from the sum of the wages. Should inundation impede (the work), he shall calculate a proportional reduction (of the wages).
>
> [Berger translation]

Whether this contractual clause represents a case of *remissio mercedis* agreed on by the parties in their *lex contractus* need not detain us here (although it very much looks like one.)[140] We are here concerned only with the concept of *vis* used in this contract. It has been suggested that this *lex* was drafted by someone with knowledge of the law.[141] This, in turn,

137 Müller, *Gefahrtragung*, 26–27.

138 Martin, S.D. "The Case of the Collapsing Watercourse: Builders' Responsibility for Damage in Classical Roman law" 1986 *LHR* (4), 423–437, 425.

139 Bruns, *Fontes*, 269–270.

140 Sitzia, F. "Remissio pro rata?" in *Studi per Giovanni Nicosia* VII (Milan 2007), 445–469.

141 Berger, A. "A labor Contract of AD 164, CIL III P. 948 No. X" 1948 *Classical Philology* (43-3), 231–242, 233.

provides good insight into the concept of *vis* by the end of the first century CE. Had it been a legal term with a definite meaning, it would have been used, like the phrase *dolus* without much comment. Instead, the drafter of this contract chose to specify the type of *vis* which was most common in this industry, thus suggesting that the term was very much rooted in its context. It is also telling that a text by Iavolenus of the early second century CE, D.19.2.59 (Iavolen. 5 Lab. Post.), qualifies *vis* as *naturalis* and mentions earthquake as an example of such an event. Had a stable notion of *vis* existed by the end of the first century CE, these texts would merely have referred to *vis maior*.

Evidence from the second century CE provides us with three pieces of information about the notion of *vis*. The earliest is that of Julian/African in D.19.2.33 (African. 8 Quaest.) where the much debated issue of state expropriation of land is discussed. This is followed by a celebrated text from Gaius in D.19.2.25.6 (Gaius 10 ad Ed. Prov.) which appears to provide a definition of sorts for the notion of *vis* and its impact on the tenant and finally there is C.4.65.1 (mentioned before), dated 213 CE which mentions the term *periculum vis maioris vel effracturam*.

> D.19.2.33 (African. 8 Quaest.) ... sin vero ab eo interpellabitur quem tu prohibere propter vim maiorem aut potentiam eius non poteris, nihil amplius ei quam mercedem remittere aut reddere debebis, ...
>
> ... but if he should be interfered with by someone whose action you cannot hinder, either because he employs force or has superior resources, you will only have to make an abatement of rent, or give back the excess if you have received it, ... [Monro translation]
>
> D.19.2.25.6 (Gaius 10 ad Ed. Prov.) Vis maior, quam Graeci θεου βίαν appellant, non debet conductori damnosa esse, si plus quam tolerabile est laesi fuerint fructus: ...
>
> A lessee ought not suffer by vis maior, θεου βία, as the Greeks call it, if his crops are damaged beyond what he can reasonably be expected to bear ...
> [Monro translation]

Although information is limited, at least two conclusions may be drawn from these texts regarding the meaning of *vis* during the second century CE. First, it is clear that the meaning of the term was still open to interpretation and that it was not yet settled whether events such as expropriation or burglary fell within the ambit of *vis*. At the same time, however, the Gaius text suggest that the jurists appreciated that *vis* should not operate to the detriment of one of the parties to the contract. This suggests the rise of conceptual thinking about the term and its impact on the contract. It is

particularly telling that the text from the *Codex* links *periculum* and *vis maior*. This text therefore heralds the start of conceptual thinking about a unified abstract notion of *vis maior*.

The final phase in the development of this notion occurs in the texts attributed to Ulpian:

> D.4.9.3.1 (Ulpian. 14 ad Ed.) … Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem dari. Idem erit dicendum et si in stabulo aut in caupona vis maior contigerit.
>
> Hence, Labeo writes that if anything is lost through shipwreck or an attack by pirates, it is not unfair that a defense be given to the "seaman." The same must be said if an act of *vis maior* occurs in a stable or inn. [Watson translation]

It is clear from the final statement in this text that Ulpian regards *vis maior* as stable conceptual notion which can be applied not just to the case at hand but also, by analogy to other instances where it serves a similar function. This suggests that the term had by the third century matured into an abstract conceptual notion.

In an insightful article regarding the conceptual difficulties of the concept of *vis maior* in letting and hiring, Ernst argued that the idea of *vis* evolved with time.[142] According to Ernst, the earliest notion of "risk" in letting and hiring would have been *res perit domino* as in the contract of sale. In other words, there would not have been any room for the apportioning of "risk" in the contract and the loss arising from unforeseen and uncontrollable events would as a matter of course have fallen upon the *locator* as *dominus* of the object of lease.[143] There may be a link here between the uncertain terminology "sale/lease" which occurs in works of the period, but this need not detain us here. This also suggests that the "risk" regime which eventually matured in the contract of letting and hiring originated in the by then already established risk regime in the contract of sale. In time, this "hard rule" would have been mitigated by the development of the notion of "risk" in which the risk was divided/assigned to one of the parties to the contract. In Ernst's view, this had occurred by the time of Ulpian in the third century CE.

When this hypothesis is mapped onto Fiori's account of the conceptual development of the contract of letting and hiring, new perspectives emerge. During the first phase of conceptual thinking about the contract of letting and hiring from the inception of the contract c. 150 BCE to roughly the end

142 Ernst, W. "Wandlungen des *vis maior*—Begriffes in der Entwicklung der römischen Rechtswissenschaft" 1994 *Index* (22), 293–321, 294.

143 Idem.

of the Republic, a gradual divergence must have occurred from the notion of *res perit domino* towards the *vis/vitium* division which was introduced by Servius. Since this phase also corresponds to the period when *dolus* emerged out of the contractual obligation at the heart of the contract itself but when *culpa* had not yet done so, it cannot be said that at this point any relationship existed between *vis* and the notion of "liability". At this point *vis* merely stood loosely at the edges of the reciprocal obligation, namely where "liability" could not be constructed with reference to concepts such as *bona fides*.[144] During the second phase of conceptual thinking about letting and hiring, in the period roughly spanning the first century CE, the jurists began to explore the extent of the parties' interests in the context of their contractual obligations. It is not difficult to see how such mode of thinking would also have had an impact on the emerging of an idea of *culpa*. It has been shown by Frier that it was during this period that the jurists began to move away from pure casuistry in favour of *culpa* as a unifying idea which underpinned the cases. It is hardly surprising to find that it is during this period as well that some development in the notion of *vis* occurs.[145]

At this point, *vis* as a concept was still fluid enough to permit some discussion as to whether events such as expropriation and burglary fall within its ambit, but the clear statement in the Gaius text (D.19.2.25.6) about the function of *vis* in the context of letting and hiring suggests the start of conceptual thought on the matter.[146] It seems reasonable to surmise that it was during this period that a change occurred in the function of *vis* and it became "leistungsbezogen" to use Ernst's terminology in the sense that it excused liability.[147] It is important to bear in mind that this development of the idea of *vis* did not occur in isolation. Instead, the concept evolved in tandem with the notion of *culpa*.[148] As for the final phase in conceptual thinking about letting and hiring, Fiori has demonstrated that jurists of the second and third centuries focused on identifying the limits of the contract in relation to other *negotia*. It is evident from the limited information about *vis* available in the texts that it matured during this period into a stable conceptual category described by third-century jurists such as Ulpian as *vis maior*. It should not be forgotten that this process of maturing most probably occurred against the backdrop of the development of the *cognitio*

[144] Ernst 1994 *Index* (22), 293–321, 300–301.
[145] Ernst 1994 *Index* (22), 293–321, 307.
[146] Müller, *Gefahrtragung*, 40.
[147] Ernst 1994 *Index* (22), 293–321, 307.
[148] Ernst 1994 *Index* (22), 293–321, 294.

process as the standard civil procedure. It seems plausible that in such a system with salaried judges managing the entire process and without the conceptual fluidity of praetorian law, stable conceptual categories were more useful.

As for *casus*, a few comments will suffice. According to modern renditions of the "risk" regime in the contract of letting and hiring, *casus fortuitus* is equated with *vis maior*. There is little doubt that such an association is correct, even if Robinson's research has shown that *casus* had many meanings in Roman law.[149] In texts on letting and hiring, *casus* is poorly represented. There are only two texts in which the issue is explored. The first, D.19.2.9.4 (Ulpian. 32 ad Edict.) a text by Ulpian in which he quotes seemingly verbatim a rescript from the reign of Antoninus Pius in the first half of the second century CE. The second text, C.4.65.28 (mentioned before), from the reign of Diocletian, mentions *casus* in the same manner as a counterpoint to *dolus* and *culpa*.

> D.19.2.9.4 (Ulpian. 32 ad Ed.) Imperator Antoninus cum patre, cum grex esset abactus quem quis conduxerat, ita rescripsit: 'si capras latrones citra tuam fraudem abegisse probari potest, iudicio locati casum praestare non cogeris, atque temporis quod insecutum est mercedes ut indebitas reciperabis.'
>
> A flock which a man had hired was driven off by robbers. The Emperor Antoninus and his father gave the hirer a rescript as follows:- "If you can show that the goats were driven off by robbers without any collusion on your part, you will not be compellable to answer for this mishap by an action on the contract, and if you paid for the hire of the flock in respect of any subsequent time, the money was 'undue', and you can recover it accordingly."
>
> [Monro translation]

Here, *casus* is used similar to *vis* as concept which excuses liability. Such development would be consistent with the development of *vis* outlined above.

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149 Robinson, O.F. "*Casus* in the Digest" in *Essays in Honour of Ben Beinart* vol. 2 (Cape Town 1979), 337–345, 337–345. See also Cardilli, *L'Obbligazione di 'praestare'*, 260 and Ernst 1994 *Index* (22), 293–321, 310 as well as Molnár, *Haftungsordnung*, 72, 82.

The *OLD* defines *casus* as "That which turns out or happens unexpectedly, an occurrence, event, accident, chance, misfortune, emergency." [*OLD*, 299]. There is a suggestion that Cicero may have been particularly influential in the use of this term. Berger, *Encyclopedic Dictionary*, 382 defines it as: "An accident, an event which happened without any human intervention or fault. … According to a general principle 'no one is responsible for *casus*' (*casus a nullo praestatur* D.50.17.23), the owner of a thing suffered the damage caused by *casus* unless another had assumed responsibility for such loss."

The final notion to be investigated is that of *vitium*.[150] In the standard modern rendition of the "risk" regime in the contract of letting and hiring, *vitium* denoted the counterpoint to *vis*. According to the distinction introduced by the Republican jurist Servius in D.19.2.15.2, the *locator* in *locatio conductio rei* borne the losses arising from *vis cui resisti non potest*, while the *conductor* bore the losses arising from *vitia ex ipsa re*.

> D.19.2.15.2 (Ulpian. 32 ad Ed.) ... si qua tamen vitia ex ipsa re oriantur, haec damno coloni esse, ...
>
> ... but if mischief arises from the vice of the thing itself, this falls on the tenant, ... [Monro translation]

Much ink has been spilt over the meaning of these terms, but as in the case of *vis* it is now generally accepted that the term *vitia ex ipsa re* did not have a defined legal meaning.[151] At best it may be said that it denoted losses which arose from a "flaw" within the object and which fell within the sphere of agricultural production and therefore had to be borne by the *conductor*. This vague meaning is hardly surprising in light of the comments made above concerning the meaning of *vis*. More significantly, however, for our purposes is the meaning which this term acquired over time. There is little to be said about the meaning of this term in the first century of the Principate as the term does not appear in the works of any jurists from that period which have been preserved (Ulpian cites Labeo in two texts, but it is difficult to attribute these statements to Labeo). As for the second century CE, there are only two texts in which it occurs in the context of letting and hiring. The first, attributed to Iavolenus concerns a "flaw" in the completion of a task:

> D.19.2.51.1 (Iavolen. 11 Epist.) Locavi opus faciendum ita ut pro opere redemptori certam mercedem in dies singulos darem: opus vitiosum factum est: an ex locato agere possim? ...
>
> I engage for a piece of work to be done on the terms of paying the contractor at the rate of so much a day for the whole: the work turned out faulty; have I an action on the contract? [Monro translation]

The second text, attributed to Gaius, mentions a "flaw" in a building:

> D.39.2.29 (Gaius 28 ad Ed. Prov.) Sed et si conducere hospitium nemo velit propter vitium aedium, idem erit dicendum.

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150 See Müller, *Gefahrtragung*, 31 for a good survey of recent literature and of the academic debate surrounding this term.

151 See Fiori, *Locatio conductio*, 91–92 for a survey of the debate. The *OLD* (2000) defines it as "a fault, defect, blemish, imperfection, vice." Berger, *Encyclopedic Dictionary*, 760 similarly denotes a generic meaning. It is also clear from the number of entries of different types of *vitia* that the term had a wide-ranging application in Roman law.

> The same also will have to be held in a case where no one is willing to rent a guest room because of defect in the house. [Watson translation]

The term *vitium* appears to have been used more frequently in the works of jurists from the third century CE. In the works of Paul, *vitium* appears in the context of the contract of letting and hiring both when referring to a defect in the thing such as the defect in the soil in D.39.2.18.4 (Paul. 48 ad Ed.):

> D.39.2.18.4 (Paul. 48 ad Ed.) Ei, qui in conducto solo superficiem imposuit, dominus soli, quod vitio soli damnum futurum sit, cavere non debebit nec soli domino superficiarius, quia invicem ex conducto et locato habent actiones: …
>
> When somebody has put a *superficies* on soil which he has leased, the owner of the soil will not have to give him a *cautio* because injury may occur by defect in the soil, nor will the holder of the right of *superficies* have to give a *cautio* to the owner, since they can employ actions arising respectively from lease and hire. [Watson translation]

It is also mentioned in the sense of a defect in a ship in D.14.2.10.1 (Labeo 1 Pith. a Paulo Epit.). This text is particularly interesting as it uses the term in the same context as *dolus* and *culpa*. Arguably the most interesting occurrence of *vitium* in the context of letting and hiring in the works of Paul is the famous D.19.2.62 (Lab. 1 Pith.) where the jurist distinguishes between *vitium soli* and *vitium operis* in the context of the construction of a channel.[152] This text is particularly important as it links the notion of *vitium* with that of *periculum* and demonstrates that "risk" may shift from one party to another. The term *vitium* appears in three texts on letting and hiring written by Ulpian. Two of these D.9.2.27.29 (Ulpian. 18 ad Ed.) and D.19.2.13.5 (Ulpian. 32 ad Ed.) broadly deal with a case of *locatio conductio* of *operae* where a level of skill is required (filigree work to a cup and engraving of a jewel), whereas D.19.2.15.2, in which the celebrated Servian distinction between *vis* and *vitium* is introduced, Ulpian used it in the context of letting and hiring of land.

Given the relationship between notions of contractual liability and the criterion of good faith, a final point which deserves mention is the scope and function of *bona fides* in these actions.[153] At its most basic, *bona fides* was a criterium developed by the Roman jurists to assess the fairness of legal

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152 Martin, 1986 *LHR* (4), 423–437.

153 Vacca, L. "Buona fede e sinallagma contrattuale" 1997 *IVRA* (48), 125–144, 128 where the author argued that *bona fides* was intimately connected to the *synallagma* in the contract. It was used as the criterion to assess if and to what extent the *condemnatio pecuniaria* should occur. Any examination of *bona fides* should also take account of the term *aequitas*. See also Talamanca, *Bona fides*, 311. There are three texts in which the term is used in the context of this contract namely D.19.2.9 pr (Ulpian. 32 ad Ed.); D.19.2.19.9 (Ulpian. 32 ad Ed.) and

acts.[154] It had a wide application and appears in many branches of Roman law. In the law of contracts, the purpose of this criterium, in the words of Cardilli, "… permitted the recalibration of the position of the contracting parties according to standard of justice."[155] That good faith was used as a measure in the contract of letting and hiring is beyond dispute. In the formula of the *actio locati* and *conducti*, the judge was instructed to assess the quantum of the claim in terms of whatever is "fair and reasonable" (*quidquid dare oportet ex fide bona*). This, according to Schermaier, allowed the judge to assess the totality of the relationship between the parties.[156] This function of good faith is visible in a number of texts. In D.2.14.58 (Nerat. 3 Membran.), taken from the work of Neratius, a jurist of the early second-century CE, the opinion of Aristo, a jurist of the late first – early second century CE clearly shows that agreements between contract parties are assessed with reference to *bona fides*.[157] A similar view may be found in D.50.8.3.2 (Ulpian. 3 Opin.).[158] This complex text, which forms part of the discussion on *remissio mercedis*, demonstrates that a judicial investigation into the terms of a lease has to take good faith into account. Here it is used as a tool to establish party intention. A similar view may be found in D.19.2.21 (Iavolen. 11 Epist.).[159] Here, a reference to good faith is used to reinforce the point that agreements have to observed. This reinforces the

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D.24.3.7.1 (Ulpian. 31 ad Sab.). These texts demonstrate that the term *aequitas* was used by the Roman jurists in the context of discussions on the contract of letting and hiring when appealing to a general sense of fairness/equity.

[154] For a succinct overview of the development of this concept, see Schermaier, M-J. "*Bona fides* in Roman contract law" in *Good Faith in European Contract Law* (Cambridge 2000), 63–92.

[155] Cardilli, R. *Bona fides tra storia e sistema* (Turin 2004), 59–63.

[156] Schermaier, *Bona fides*, 84.

[157] Ab emptione venditione, locatione conductione ceterisque similibus obligationibus quin integris omnibus consensu eorum, qui inter se obligati sint, recedi possit, dubium non est. …

There is no doubt that by the consent of all who have entered into the obligation, withdrawal can be made from sale, hire, and other similar obligations, provided that nothing has been done. [Watson translation]. See MacCormack, G. "*Custodia* and *Culpa*" 1972 *ZSS* (rA) (89), 149–219, 195–196.

[158] Sed si in locatione fundorum pro sterilitate temporis boni viri arbitratu in solvenda pensione cuius anni pacto comprehensum est, explorata lege conductionis fides bona sequenda est.

But if in the renting out of property there is in the agreement some provision for a season of blight in relation to the making of payment for each year, at the discretion of an upright arbitrator, good faith is to be observed once the terms of the contract have been investigated. [Watson translation].

[159] … [B]ona fides exigit, ut quod venit. … On this text, see Mayer-Maly, *Locatio conductio*, 60.

view that the rights and duties of the parties were derived from good faith. The same notion is visible in D.19.2.45.1 (Paul. 52 ad Ed.).[160] An assessment of the content of the agreement between the parties has to be done in accordance with good faith as can be seen from C.4.65.22 (a. 293).[161] One text also mentions that the contract of letting and hiring is based on good faith as in D.19.2.35 pr (African. 8 Quaest.).[162] Finally, the term is also used to juxtapose unacceptable forms of behaviour in the contract as in D.4.2.21.4 (Paul. 11 ad Ed.).[163]

160 … [Q]uasi longe sit a bona fide actum, ut quid patiaris detrimenti per eam rem quam conduxisti, … On this text, see Mayer-Maly, *Locatio conductio*, 157.

161 Si hi, contra quos supplicas, facta locatione temporis certi suas tibi locaverint operas, quatenus bona fides patitur, causa cognita competens iudex conventionem servari iubebit.

If the persons against whom you direct your petition hired you to do their work for a definite time, the proper judge will, upon investigating the cause, order the agreement to be carried out as far as equity permits. [Blume translation].

162 … Intellegendum est autem nos hac distinctione uti de eo, qui et suum praedium fruendum locaverit et bona fide negotium contraxerit, …

Of course in making this disctinction I am supposing the case of a man who leases his own property and makes a contract in good faith, … [Monro translation]. On this text, see Mayer-Maly, *Locatio conductio*, 163–166 and Fiori, *Locatio conductio*, 230–236.

163 Si metu coactus sim ab emptione locatione discedere, videndum est, an nihil sit acti et antiqua obligatio remaneat, an hoc simile sit acceptilationi, quia nulla ex bonae fidei obligatione possimus niti, ….

If I am compelled under duress to withdraw from a sale or hire, it is to be seen whether nothing has been done and the old obligation remains or whether this is similar to formal release, because there is no obligation in good faith upon which we can rely since it is ended by being lost. … [Watson translation].

CHAPTER TWO

LETTING AND HIRING OF *OPERAE*

The *actio locati*

Quod Aulus Agerius Numerio Negidio operas quo [quibus] de agitur locavit, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret, absolvito.

Whereas the plaintiff (Aulus Agerius) let the *operae* in question to the defendant (Numerius Negidius), whatever on that account the defendant ought to do or to give the plaintiff *ex fide bona*, oh judge, condemn the defendant to the plaintiff, and if not, absolve him. [Own translation]

The *actio conducti*

Quod Aulus Agerius de Numerio Negidio operas quo [quibus] de agitur conduxit, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret, absolvito.

Whereas the plaintiff (Aulus Agerius) rented the *operae* in question from the defendant (Numerius Negidius), whatever on that account the defendant ought to do or to give the plaintiff *ex fide bona*, oh judge, condemn the defendant to the plaintiff, and if not, absolve him. [Own translation]

1. Introduction

Supporters of the civilian trichotomy impose a threefold division upon the Roman contract wherby a distinction is drawn between contracts aimed at the fulfilment of a task (*opus facere*) and those aimed at the provision of services (*operae*).[1] Examples of these two categories abound in Roman legal texts, but academic debate about them continues to flourish. The debate is limited to two broad areas, namely whether these two categories existed in Roman law and whether it is useful or even necessary to draw such a

[1] See Thomas, J.A.C. "*Locatio* and *Operae*" 1961 *BIDR* (64), 231–247; Molnár, 1982 *BIDR* (85), 127–142; Möller, *Freiheit*, 39–40. See also Zimmermann, R. *The Law of Obligations: Roman foundations of the Civilian Tradition* (Oxford 1996), 395.

distinction. As with the debate surrounding the *formula* of the actions, this debate about categorisation has been generated in a large measure by a particular intellectual approach towards the texts. The lingering influence of German legal scholarship on the contemporary study of Roman law has created a particular paradigm of thought which is aimed at the identification of categories which contain general rules of law *in abstracto*. This has led scholars to attempt to construct watertight categories using the "object" of these transactions (*opus*/*operae*) and to identify the *essentialia* of the "archetypal" standard contract in each of these categories.[2]

By contrast, Fiori has argued that the distinction between *opus* and *operae* is foreign to Roman legal thought.[3] In his view, the Roman jurists did not distinguish between these two terms in any sense, nor did they see them as the "object of the obligation". Thus, in his view, these terms and the categories which they represent should be abandoned in favour of a single category broadly defined as tasks (*operae*), which better reflects the Roman jurists' untechnical use of the terminology when expressing the reciprocal obligation (*merces—operae*) at the core of the contract of letting and hiring. Within this comprehensive category, Fiori suggested that a potentially infinite number of refinements likely existed depending on the content of the agreement.[4] In this chapter, I have indentified a number of refinements within the broad category of letting and hiring of *operae*. This has been done by grouping together a number of "normative" examples, to use the terminology of Kehoe, which appear in the texts. By analysing these, I wish demonstrate some of the underlying ideas which the Roman jurists employed to develop the law of letting and hiring.

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[2] Nowhere is this more evident than in the convoluted debate about D.50.16.5.1 (Paul. 2 ad Ed.), a difficult text in which Paul appears to define the term *opus* using Greek terms. For a survey of this debate, see Wubbe, F. "*Opus* selon la definition de Labeon (D.50, 16, 1, 5)" 1982 *TvR* (50), 241–251 and Biscardi, A. "Quod graeci *apotelesma* vocant" 1989 *Labeo* (35), 163–171. For a survey of modern scholarly opinion on this text, see Martin, *Private Building*, 36–37 and Fiori, *Locatio conductio*, 158–161.

[3] Fiori, *Locatio conductio*, chapter 6.

[4] See, for example, D.19.2.51.1 (Iavolen. 11 Epist.) for an example which defies categorisation.

2. Letting and Hiring of *Operae* Which Involves the Transformation of the Property of One of the Contracting Parties

Roman legal texts contain many examples of this refinement within the larger category of *locatio conductio* of *operae*. Most are mentioned only in passing, but some are discussed in sufficient detail to permit the construction of a "normative" example. The examples which will be analysed in greater detail are fullering and tailoring, apprenticing, goldsmithing and engraving and finally construction. In each of these examples, the property of one of the contracting parties (usually the *locator* of the *operae*) is entrusted to the other contracting party and in some way "transformed/altered" (in a broad sense) in the context of the *operae*. As will be seen from the examples discussed below, such a "transformation/alteration" could cover a wide spectrum of cases ranging from the cleaning of clothes to the construction of a new building. In deciding these cases, however, the jurists applied similar ideas, most notably concerning *custodia* of the object and the assessment of the extent to which the *operae* had been performed in accordance with the contract (*probatio*).

2.1. *Fullering and Tailoring*

Judging from the content of juristic discussions on laundering of clothes in Roman legal sources, the jurists were primarily interested in its contractual aspects. With the exception of fleeting references in D.7.1.13.8 (Ulpian. 8 ad Sab.) and D.39.3.3 pr (Ulpian. 53 ad Ed.), none of the legal texts focus on the location of laundries or industrial process associated with the laundering of clothes in the ancient world. It has been suggested that the average Roman laundry was a medium-sized enterprise employing between nineteen and twenty-seven workers.[5] Although generalisations of this kind are dangerous, especially since this "normative" example is likely reflect reality only in some sense, such information provides some insight into the complex management structures often visible in Roman legal texts. To form a greater understanding of the detail, the legal structure of the contract must be explained.

In the stock example which can be collated from the texts, the *locator* (customer) let out the completion of a task (the laundering of clothes) to

[5] Stambauch, J. *The Ancient Roman City* (Baltimore, Md. 1988), 151–152. See also Treggiari, S. *Roman Freedmen During the Late Republic* (Oxford 1969) generally.

the *conductor* (fuller) who undertook to complete the task in return for the payment of a certain amount of money. It seems likely that a verbal contract would have been the norm, since none of the extant legal, literary or epigraphic sources suggest the existence of written contracts.[6] It seems safe to assume that the parties would have had to agree on the task to be performed (the laundering of the clothes) and the amount of money to be paid for the contract to come into existence. If examples of *leges locationis/conductionis* from other industries are used as a comparator, matters such as the duration of the agreement and the dates/amount of payment would also have been included although Roman legal texts provide no information about this.[7] It is plausible that a form of *probatio* may have existed, but the evidence is scant.

Letting and hiring was not the only legal transaction that could be used in the context of the laundering of clothes. Examples of the use of *stipulatio* and mandate also occur in the texts. Moreover, as mentioned in chapter one, the classification of an agreement as one of letting and hiring (or something else) may often only have become relevant after the fact in the event of breach of contract when the appropriate legal action had to be assigned to the dispute. This can be seen from a text where Gaius sought to demonstrate the relationship between the contract of letting and hiring and other named contracts (Inst.Gai.3.162).[8]

Legal sources show that a fuller could either be a free person or a slave. Examples of servile fullers occur in the texts such as in D.34.5.28 (Iavolen. 3 Post. Lab.), D.14.4.1.1 (Ulpian. 29 ad Ed.) and D.33.7.12.6 (Ulpian. 20 ad Sab.), but these cannot be used to infer that all fullers were necessarily slaves. With that said, the case of the servile fuller was of interest to the jurists, likely owing to the complex contractual arrangement which it generated. It must

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[6] D.19.2.13.6 (Ulpian. 32 ad Ed.) suggests that a fuller had to have a system for distinguishing the laundry of individual customers for fear of being held liable under contract if clothes were misplaced. This suggests the use of tokens or other measures to indentify the clothes of individuals.

[7] Compare D.19.2.13.6 (Ulpian. 32 ad Ed.).

[8] In summa sciendum est, quotiens faciendum aliquid gratis dederim, quo nomine si mercedem statuissem, locatio et conductio contraheretur, mandati esse actionem, veluti si fulloni polienda curandave vestimenta dederim aut sarcinatori sarcienda.

Lastly, it is important to notice that wherever I give something to be done for nothing in circumstances in which, had I fixed a charge, there would have been a contract of hire, the action on mandate lies, for instance, if I give clothes to a cleaner for cleaning or for some other treatment or to a tailor for repair. [Gordon Robinson translation]. Compare Inst.Gai.3.143. This text forms part of a larger debate concerning the legal boundaries between letting and hiring and mandate which need not detain us here. For an overview of this debate, see Fiori, *Locatio conductio*, 263–270. The text is repeated in Justinian's Institutes, see Inst.3.24.1.

be assumed that the fuller was either the owner of the business or a financial speculator who rented the business from its owner.

Two legal texts provide some information on the contractual relationship between fullers and their customers:

> D.14.3.5.5 (Ulpian. 28 ad Ed.) Item fullonum et sarcinatorum praepositos. Stabularii quoque loco institorum habendi sunt.
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> Even muleteers can properly be called *institores* as can those who are appointed by launderers and tailors. [Watson translation]
>
> D.14.3.5.10 (Ulpian. 28 ad Ed.) Sed et cum fullo peregre proficiscens rogasset, ut discipulis suis, quibus tabernam instructam tradiderat, imperaret, post cuius profectionem vestimenta discipulis accepisset et fugisset, fullonem non teneri, si quasi procurator fuit relictus: sin vero quasi institor, teneri eum. Plane si adfirmavit mihi recte me credere operariis suis, non institoria, sed ex locato tenebitur.
>
> Suppose that a person setting out on a voyage leaves his whole laundry business in the hands of his apprentices to whom he asks his customers to give their orders and that after he has gone, an apprentice takes the clothes and makes off with them. The launderer will be liable if the apprentice was left as a business manager (*institor*), but not if he was left as a kind of personal agent (*procurator*). Of course, if he had warranted that I could trust his staff, he can be sued on the contract of work, not on the business manager's conduct.
> [Watson translation]

D.14.3.5.5 shows that a worker could act as the *institor* (commercial agent) of an absentee fuller and D.14.3.5.10 indicates that apprentices could operate in this capacity as well. *Institores* were often (though not always) slaves and this text shows that apprentice fullers (whether servile or free) could be installed in a place of business to contract with customers on the fuller's behalf.[9] To understand the text, certain observations about its provenance are required.[10] It is commonly assumed that this text contains the views of both Labeo and of Ulpian. The first part of the text (*Sed … eum*) is said to reflect the views of Labeo and the final sentence (*Plane … tenebitur*) is taken to be the view of Ulpian. The text mentions two commercial transactions, one between the fuller and his apprentices (one of which subsequently commits theft) and the other between the apprentices and the customers

[9] On the status of *institores*, see Kirschenbaum, A. *Sons, Slaves and Freedmen in Roman Commerce* (Washington DC 1992), 144. See also Miceli, M. *Studi sulla "rappresentanza" nel diritto romano* (Milan 2008), 302-306.

[10] For criticisms of this text, see Knütel, 1983 *ZSS* (rA) (100), 340–443, 407, 408 note 275.

of the laundry.[11] The contract between the fuller and his apprentices will be discussed below in relation to apprenticing. Let us first consider the contract between the apprentices and the customers of the laundry. The question raised in D.14.3.5.10 is whether, in the event of loss suffered by a customer through the actions of one of the apprentices, the fuller is contractually liable and to what extent.

It is impossible to establish from this text whether Labeo and Ulpian meant servile or free apprentices (especially given the differing untechnical terminology *discipulus—operarius*), but it seems safe to assume that the fuller was free.[12] In all likelihood, the apprentices were free as well, otherwise, we assume, the authors would have mentioned that they were slaves. Using these assumptions as our premises, the text demonstrates three important points. First, the fuller instructed his customers to trade with his apprentices. The nature of this request is not mentioned in the text, but various legal texts mention public notices (*praepositiones*) being posted outside an establishment, especially where *institores* were present.[13] In second place, if an apprentice appointed as *institor* were to steal from a customer, the fuller would be liable contractually under the *actio* (*locati*) *institoria* for the full loss suffered by the customer (*id quod interest*), i.e. not only the failure to fulfil the *operae* as agreed in the contract, but also the loss of the clothes.[14] This scenario is contrasted against a related one. If the thieving apprentice had been appointed as a *procurator*, on the other hand, the fuller would not be liable under letting and hiring. The reason for this distinction lies in the terms of the appointment of the apprentice. *Institores* or business managers (commercial agents), who were often (but not always) slaves, were appointed with clear instructions which explained both to the contracting parties and also the public at large the extent of their authority.[15] *Procuratores* or personal agents, on the other hand, were mostly free people of higher standing who received instructions (a *procuratio*) of a more general nature, and who were given a general remit to manage someone's

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[11] There is no evidence to support the interpretation that an "unnamed" *institor/procurator* was appointed to manage the apprentices. I support Aubert, J.-J. *Business Managers in Ancient Rome—a Social and Economic Study of Institores, 200 B.C.–A.D. 250* (Leiden 1994), 74 note 146 whereby the apprentices where jointly appointed managers of the laundry.

[12] Knütel, 1983 *ZSS* (rA) (100), 340–443, 409 suggests that the apprentices were likely free.

[13] D.14.3.11.2, 5 (Ulpian. 28 ad Ed.). See also Aubert, *Business Managers*, 74 note 146.

[14] Cerami, P. et al. *Diritto commerciale romano. Profilo storico* (Turin 2004), 53–56.

[15] See Inst.Gai.4.71 and Kirschenbaum, *Sons*, 145. Cerami, *Diritto*, 79–80 maintains that from the time of Servius Sulpicius Rufus in the late Republic it was legally possible to appoint a slave as an *institor*.

affairs.[16] Thus, in the first scenario the reason for holding the fuller liable would be that the terms of the instructions had been breached and that the loss of property occurred in relation to the fuller's sphere of business, while in the latter case, given the general nature of the instructions, the fuller would not be liable as it would be more difficult to attribute *culpa* to him. This lack of specific instructions combined with the (mostly) free status of a personal agent (*procurator*) seems to account for the absence of the fuller's liability in this regard. What the text does not mention is whether the customer could sue the *procurator* directly on account of the theft. If the *procurator* was a free person and contracted with customers in his own name and on his own authority, it seems safe to assume that the customer would have had both a contractual action (*ex locato*) against him for loss of clothes and a delictual action (*ex furto*) against the thief for the theft of the clothes. As will be shown below, these actions could not be brought concurrently.

The final sentence of D.14.3.5.10 is more interesting. According to Ulpian it was possible for the customer to sue the fuller contractually *ex locato* where he had guaranteed that the staff could be trusted. Although this statement follows immediately after the discussion on *procuratores*, its content suggests that it is meant to be read in conjunction with the first scenario concerning the *institor*. It is unclear why Ulpian prefers the *actio locati* over the *actio* (*locati*) *institoria*, since the scope and function of these two actions would have been identical.[17] Some scholars have therefore interpreted the phrase ... *si adfirmavit mihi recte me credere operariis suis* ... as an example of an implied guarantee of trust, while others have suggested that this is an example of the fuller's *custodia* liability in relation to his employees.[18] Since, as will be seen below, the notion of *custodia* as a criterion of contractual liability is now widely discredited, the answer must lie in the element of trust mentioned in the text which has to be seen in the context of the development of vicarious liability discussed in chapter one. Given that vicarious contractual liability was fully developed by the time of Ulpian, it seems likely that Ulpian's statement should be read in this context. This notion of trust (... *si adfirmavit mihi recte credere* ...) was seen as a gradation of specific instructions which means that legally the fuller was deemed to be closely involved in the activities of his apprentices.[19] It is important to note, however, that Ulpian is not contrasting these two actions in absolute terms. The

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16 See Kirschenbaum, *Sons*, 144.
17 Aubert, *Business Managers*, 75 note 147.
18 Knütel, 1983 *ZSS* (rA) (100), 340–443 note 75.
19 See Miceli, *Studi sulla "rappresentanza"*, 302.

final passage of this text cannot be taken to mean that the customer must use the *actio locati* rather than the *actio* (*locati*) *institoria*. It merely means that in cases of trust, the *actio locati* was available. It could be that Ulpian wished to underscore the personal nature of the obligation by suggesting that it was the more appropriate action in this case.

To that end, the extent of the fuller's contractual liability must be investigated further. The Roman jurists discussed the contract between fuller and customer from the perspective of the available actions. As shown in chapter one, the default notions of liability in the actions on letting and hiring were that of *dolus* or *culpa*, but the following text adds a level of complexity to the discussion:

> D.4.9.5 pr (Gaius 5 ad Ed. Prov.) … Nam et fullo et sarcinator non pro custodia, sed pro arte mercedem accipiunt, et tamen custodiae nomine ex locato tenentur.[20]
>
> For the fuller and tailor receive a fee not on account of safekeeping (*custodia*), but for the exercise of their skill; and yet they are liable under the action for letting on account of safekeeping (*custodiae nomine*). [Watson translation]

This text demonstrates the complexity of the term *custodia*.[21] If *custodia* (especially in the sense of *pro custodia* in the first part of the sentence) is taken here to refer to a deviation from the default notions of liability—a form of "strict liability" whereby the fuller was legally responsible for all loss except those caused through *vis maior*—it contradicts other texts where the fuller's contractual liability is described using the default notions. Since scholars now believe that *custodia* does not refer to a "standard of contractual liability", this apparent contradiction may be regarded as resolved.[22] *Custodia* here has a different meaning. The essence of the contract of letting and hiring between fuller and customer lay in the skill of the fuller and his staff in concluding the *operae*. The customer was paying *merces* for a certain specialist treatment (*operae*/*ars*). Owing to the nature of the treatment to which the clothes were subjected, the fuller and his staff accepted the clothing into their care. They were therefore held liable for the loss of these clothes which were in their care (*custodiae nomine*).[23]

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[20] Compare Inst.Gai.3.206 and Inst.4.1.16.

[21] De Robertis, F. *I rapporti di lavoro nel diritto romano* (Milan 1946), 165–166.

[22] Berger, *Encyclopedic Dictionary*, entry on *custodia*.

[23] Van den Bergh, G.C.J.J. "*Custodiam praestare*: *custodia*-liability or liability for failing *custodia*?" 1975 *TvR* (43-1), 59–72. See also MacCormack, 1972 *ZSS* (rA) (89), 149–219, 160, 195; Serrano-Vicente, *Custodiam praestare*, 141.

This duty to guard the clothes of the customer is inextricably linked to the fuller's execution of the contract as is expressed in the following text:

> D.19.2.13.6 (Ulpian. 32 ad Ed.) Si fullo vestimenta polienda acceperit eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere, et si pallium fullo permutaverit et alii alterius dederit, ex locato actione tenebitur, etiamsi ignarus fecerit.
>
> If a fuller takes clothes to clean, and they are gnawed by mice, he is liable on the contract, as he was bound to take precaution against this kind of mischief; and if the fuller should interchange two cloaks and send them respectively to the wrong owners, he will be liable in the same way, though he made the confusion without knowing it. [Monro translation]

The examples provided in this text clearly refer to *culpa*. The fuller is contractually liable for loss suffered by the customer on account of damage to the clothes given to be laundered, "... quia debuit ab hac re cavere". This is nothing more than an expression of *bona fides* at the heart of the contract, which clearly also encompassed a duty to guard the clothes of the customer. Similarly, the mixing up of garments leading to loss for the customer also generates contractual liability for the fuller, "... etiamsi ignarus fecerit", since he failed to take proper care of the clothes while under his control. Again, this statement also implies that the fuller was contractually liable even if he did not personally lose the clothing. This statement should be seen in the context of the development of vicarious liability as explained in chapter one. Van den Bergh has rightly observed that the decision in this text is an "objectivistic" one: the fuller is expected to behave in a professional manner and must take all reasonable measures to prevent loss.[24]

Roman legal texts contain a number of stock scenarios which the jurists used to explain the availability of actions arising from breach of contract. Take the following case:

> D.19.2.60.2[25] (Lab. post. 5 a Iavoleno Epit.) Vestimenta tua fullo perdidit et habes unde petas nec repetere vis: agis nihilo minus ex locato cum fullone, sed iudicem aestimaturum, an possis adversus furem magis agere et ab eo tuas res consequi fullonis videlicet sumptibus: sed si hoc tibi impossibile est perspexerit, tunc fullonem quidem tibi condemnabit, tuas autem actiones te ei praestare compellet.
>
> Clothes belonging to you are lost by a fuller, you know who has got them, but you do not choose to sue him: you do not lose your right of action on the contract against the fuller; but I should say that it will be for the judge to

24 Van den Bergh, 1975 *TvR* (43-1), 59–72, 69.

25 See Mayer-Maly, *Locatio conductio*, 208–209.

> decide whether it is not your better course to sue the thief, and recover your property from him, of course at the fuller's expense; should the judge however find that this cannot be done, he wil give judgement in your favour against the fuller, but he will order you to assign to him your right of action against the thief. [Monro translation]

This text contains the views of both Labeo and his epitomator, Javolenus. Where a customer's clothes were stolen by a third party (not an apprentice as in D.14.3.5.10 above), two options were available at law. The customer could either sue the thief delictually or he could sue the fuller *ex locato* for breach of contract.[26] These actions could not be brought concurrently and the plaintiff had to choose. The choice of action would be determined by a variety of factors. The latter part of the text, which mentions that it is in the judge's discretion to decide whether the customer should proceed with the contractual or delictual claim, is more complex. If the latter part of the text is taken to be the view of Labeo, then the term *iudex* here must be an interpolation as under the formulary procedure the decision on the appropriate action would have been made *in iure* before the Praetor.

The text also highlights the interaction between contractual and delictual actions. Where the Praetor granted the customer the *condictio furtiva* (as owner of the clothes) (or perhaps the penal *actio furti*), the fuller could not sue the thief as well. The reason for this will become apparent from the text below. Where the Praetor refused the customer the *condictio furtiva* (for whatever reason), the customer's only recourse was to sue the fuller *ex locato* with the proviso that the action on theft and any other actions had to be ceded to him.[27] A text by Javolenus, in which he recounts the opinions of Labeo, explores a similar theme:

> D.47.2.91 pr[28] (Iavolen. 9 Post. Lab.) Fullo actione locati de domino liberatus est: negat eum furti recte acturum Labeo. Item si furti egisset, priusquam ex locato cum eo ageretur et, antequam de furto iudicaretur, locati actione liberatus esset, et fur ab eo absolvi debet. Quod si nihil eorum ante accidisset, furem ei condemnari oportere, haec idcirco, quoniam furti eatenus habet actionem quatenus eius interest.

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[26] The *quantum* of the claims differed. Under the *actio locati* it would be *id quod interest* (the value of the clothes plus any other loss suffered by the customer). With the *condictio furtiva* it would be the simple value of the clothes, see Inst.Gai.4.4 and with the penal *actio furti* it would be double the value of the clothes.

[27] Compare D.47.2.48.4 (Ulpian. 42 ad Sab.).

[28] This text is free from interpolation, but the condensed nature of Labeo's example suggests a paraphrase.

A fuller is released from the action on the contract [of hire by the owner]; Labeo says that he cannot then validly bring the action for theft. Again, if he brought theft proceedings before himself being sued on the contract and, before the judgement in the action for theft, he be released from liability on the contract, the thief must be absolved as against him. But if none of this has yet happened, the thief must be condemned to him. All this, because he has the action for theft only insofar has he has an interest. [Watson translation]

A third party stole the customer's clothes while they were in the care of the fuller or his staff. If the customer sued the fuller *ex locato*, but legal proceedings were terminated before *litis contestatio* (for whatever reason—the text does not elaborate on this point), the fuller could not sue the thief because he had not yet suffered any loss (or as the text phrases it, he has no interest in suing on theft). If the fuller sued the thief with the *actio furti* and, before judgement could be given in this matter, was sued by the customer *ex locato*, the thief had to be acquitted if proceedings in the action on letting and hiring were terminated before *litis contestatio* (again because the fuller had no interest in suing on theft). If the fuller sued the thief using the *actio furti* before being sued by the customer *ex locato*, the thief had to be condemned. The reason for this appears to be based on the inevitability of loss, since the fuller is bound to be sued *ex locato* by the customer at some future point in time, as well as on the desire to punish theft. As these three dense examples demonstrate, the *actio furti* available to the fuller essentially operated to compensate him for the financial expenditure arising from being sued by the customer *ex locato*.[29]

The relationship between the actions available to the customer (as owner of the clothes) and the fuller is further explained in the following texts by Gaius:

D.19.2.25.8 (Gaius 10 ad Ed. Prov.) Si fullo aut sarcinator vestimenta perdiderit eoque nomine domino satisfecerit, necesse est domino vindicationem eorum et condicionem cedere.

If a man who cleans or mends clothes loses his customer's property, but gives the owner security that the loss shall be made good, the latter is bound to assign him the rights of action, both *in rem* and *in personam*.
[Monro translation]

Inst.Gai.3.205[30] Item si fullo polienda curandave aut sarcinator sarcienda vestimenta mercede certa acceperit eaque furto amiserit, ipse furti habet actionem, non dominus, quia domini nihil interest ea non periisse, cum

[29] See D.19.2.6 (Gaius 10 ad Ed. Prov.).
[30] Compare Inst.4.1.15.

iudicio locati a fullone aut sarcinatore suum consequi possit, si modo is fullo aut sarcinator rei praestandae sufficiat; nam si solvendo non est, tunc quia ab eo dominus suum consequi non potest, ipsi furti actio conpetit, quia hoc casu ipsius interest rem salvam esse.

Again, suppose a cleaner charges a given sum for cleaning clothes or giving them some other treatment or a tailor for repairing them. If he loses the clothes to a thief, he, not the owner, has the action. The owner has no interest in the safety of the clothes since he can recover from the cleaner or the tailor in the action on hire, so long as that cleaner or tailor has sufficient means to make good the value of the property. [Gordon Robinson translation]

As D.19.2.25.8 shows, the owner was legally obliged to cede all actions arising from the theft of the clothes to the fuller once the latter had provided him with security that his loss will be made good. It is interesting to note that not only the action on theft was ceded, but also the *vindicatio*.[31] The customer's primary remedy against the fuller was the *actio locati*. The *quantum* of this claim would have been whatever the judge decided was fair and reasonable in context (*quidquid dare facere oportet ex fide bona*). Although it would have undoubtedly included the value of the property (included in the *id quod interest* sum), it is unlikely that a contractual claim would have yielded as much as a delictual claim.

The text from Gaius' Institutes introduces a new element into the discussion on the ceding of actions. Where the fuller was insolvent and could not provide security to the customer, the *actio furti* reverted to the owner to enable compensation for his loss to occur. A text by Ulpian confirms this point:

D.47.2.12 pr (Ulpian. 29 ad Sab.) Itaque fullo, qui curanda poliendave vestimenta accepit, semper agit: praestare enim custodiam debet. Si autem solvendo non est, ad dominum actio redit: nam qui non habet quod perdat, eius periculo nihil est.

And so a fuller who accepts garments for cleaning and attention will always have the action because he is liable for safekeeping. But if he should be insolvent, the action reverts to the owner; for nothing is at the risk of one who has nothing to lose. [Watson translation]

In light of earlier comments about the meaning of *custodia*, the first part of the text need not detain us here. Suffice it to say that it reinforces the point made earlier that a fuller was legally obliged (*custodiam praestare*) to look after the clothes in his care because he stood in a commercial relationship to

[31] The ceding of actions is confirmed by Inst.Gai.3.205 which shows that the fuller rather than the customer has the *actio furti*, See Robaye, R. *L'Obligation de garde—essai sur la responsabilité contractuelle en droit romain* (Brussels 1987), 173–174.

the owners of the clothes. In this text, Ulpian engages with Gaius by adding the element of insolvency into the juristic discussion on the availability of actions in case of theft.[32] The final and rather cryptic passage in this text reinforces the view that “risk” in Roman law was not a technical term. Before concluding this discussion about the theft of clothes and the liability of the fuller, one further point deserves mention. It was not only theft of the clothes by third parties which exercised the minds of the jurists. In D.47.2.83 pr (Paul. 2 Sent.) inappropriate use of the clothes by the fuller or his apprentices is also classified as theft.[33]

Most legal texts treat fullering and tailoring together which suggests that the Roman jurists regarded these activities as similar (or perhaps that they were commonly undertaken by the same people). Although there is a great deal of overlap in the texts, tailoring does not seem to have exercised the minds of the Roman jurists to the same extent as fullering and information is sparse. The Roman jurists were mostly concerned with tailoring from a contractual perspective with little comment on the process or its physical geography. Other than classifying it as letting and hiring (the customer being the *locator* and the tailor being the *conductor*), legal texts reveal almost nothing about the content or terms of the contract between tailor and customer. It is possible that the contract may have been a largely verbal affair. At the very least, given the nature of the contract, the parties had to agree on the work to be done and the price to be paid. The setting of a price was an important aspect of the classification of the contract, since no contract could come into existence without it.[34] One aspect of the contract which deserves specific mention is the provision of the fabric:

> D.18.1.20 (Pompon. 9 ad Sab.) Sabinus respondit, si quam rem nobis fieri velimus etiam, veluti statuam vel vas aliquod seu vestem, ut nihil aliud quam pecuniam daremus, emptioni videri, nec posse ullam locationem esse, ubi corpus ipsum non detur ab eo cui id fieret: aliter atque si aream darem, ubi insulam aedificares, quoniam tunc a me substantia proficiscitur.

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[32] Robaye, *L'Obligation*, 174–175.

[33] Fullo et sarcinator, qui polienda vel sarcienda vestimenta accepit, si forte his utatur, ex contrectatione eorum furtum fecisse videtur, quia non in eam causam ab eo videntur accepta.

If a fuller or a tailor who receives clothes for cleaning or repair should use them, he would be seen to commit theft of them by this improper use, because does not receive them for that purpose. [Watson translation]. See also D.12.7.2 (Ulpian. 32 ad Ed.) where the availability of other actions is discussed. On this text see Robaye, *L'Obligation*, 176–177.

[34] Both Inst.Gai.3.143 and 3.162 indicate that failure to do so would render the contract one of mandate rather than letting and hiring.

> It is the view of Sabinus that if I ask something be made for me, a statue, say, or some vessel or garment, I do nothing except pay the money, the contract is one of purchase and that there can be no question of letting and hiring where there is no provision of the materials from which the thing is to be made; it would be a different matter if I provided the site on which a building is to be erected, because then the principal thing does come from me.
>
> [Watson translation]

We will return to this text in greater detail below as it makes an important point regarding the letting and hiring of *operae*. For the moment, it is important to notice that, according to Sabinus, it can only be a contract of tailoring if the customer supplied the fabric (… *ubi corpus ipsum … detur*). This is not an insignificant point as will be seen further down in the discussion of goldsmiths and engravers. Because of the process involved, tailoring was classified in D.4.9.5 pr (Gaius 5 ad Ed. Prov.) as an *ars* (skill/process), thereby indicating that tailor exercised a skill (mostly manufacturing, but also mending of a garment) in return for the payment of money. The tailor was liable for *custodia*, since under the contract he took control of the customer's fabric which had to be transformed into clothes or garments which had to be mended.[35] Again, the existence of a *probatio* is plausible, but not mentioned in the texts.

Legal sources reveal little about the parties to such agreements apart from the fact that tailors could be *institores* (and thus servile or free) and that servile tailors could form part of the "stock" for the purpose of *peculium*.[36] One text sheds further light on the parties to the contract:

> D.15.1.27 pr (Gaius 9 ad Ed. Prov.) Et ancillarum nomine et filiarum familias in peculio actio datur: maxime si qua sarcinatrix aut textrix erit aut aliquod artificium vulgare exerceat, datur propter eam actio. …
>
> An action on the *peculium* lies in respect of slave-girls and daughters-in-power, especially if the ply some common trade such as sewing or weaving. …
>
> [Watson translation]

This text, where tailoring is described as a "common trade" (*artificium vulgare*) seemingly contradicts Gaius' earlier statement that tailoring is a "skill/process" (*ars*). While some have attempted to resolve this discrepancy by claiming an interpolation, a more plausible explanation appears to be that tailoring could take on different configurations from large-scale businesses to small cottage-style industries mentioned here.[37] Furthermore, the term

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35 Inst.Gai.3.206.

36 D.14.3.5.5 (Ulpian. 28 ad Ed.)

37 See, for example, Knapp, *Invisible Romans*, 88 on weaving as a cottage industry.

ars should also be approached with some caution. Given what has been said above about the untechnical nature of much of Roman legal terminology, it cannot be assumed that this term was used by the Roman jurists in a technical sense to distinguish between "skill" and "trade".

D.15.1.27 pr also shows that in some instances, daughters-in-power could operate a business as a tailor using their *peculium* and could therefore enter into contracts with customers. The type of agreement (and thus by implication the action applicable to the situation) depended on whether tailoring was done for payment or not.[38] The impression that this text creates reinforces Stambauch's view that tailoring was essentially a cottage industry on a much smaller scale than fullering.[39]

As in the case of fullering, the Roman jurists listed a number of "normative" scenarios to describe the effect of different events on the contract between tailor and customer. These are largely similar to the ones already set out in relation to fullering, but since they are "normative" it is impossible to tell whether they were general rules which applied in every instance. While in his care, the tailor had to ensure that the clothes were not used in contravention of the contract for to do so would render him liable for theft of use.[40] If the tailor lost the clothing, he was contractually liable to the customer *ex locato* for lack of professional skill. The customer, once remunerated, had to cede his actions to the tailor.[41] If the clothes were stolen, the tailor had the action on theft rather than the owner. Where he was insolvent and could not provide security to the owner for the loss suffered, the owner acquired the action on theft.[42]

2.2. *Apprenticing*

Roman legal texts provide limited information about the contractual relationship between instructor and apprentice.[43] It is clear from the texts that both slaves and free persons could train as apprentices. A *sui iuris* free person who wanted to train as an apprentice essentially let out the task as *locator* and the instructor (*conductor*) undertook to complete the task in return for payment. Where slaves or children-in-power were enrolled by an owner/*paterfamilias* as apprentices (the more likely scenario), the contract

[38] On the prices for tailoring, see Diocletian's Price Edict.
[39] Stambauch, *Roman City*, 151.
[40] D.47.2.83 pr (Paul. 2 Sent.)
[41] D.19.2.25.8 (Gaius. 10 ad Ed. Prov.).
[42] Inst.Gai. 3.205. Compare Inst.4.1.15, 16.
[43] Compare De Robertis, *I rapporti*, 197–200.

could still be one of letting and hiring, provided that the training was done in return for the payment of money. In these cases, however, the slave/child-in-power would not be a party to the contract. The owner/*paterfamilias* would likely have let out the task as *locator* to be undertaken by an instructor as *conductor*. The following celebrated text from the realm of wrongful damage to property provides some insight into the contractual relationship between instructor and apprentice.

> D.9.2.5.3 (Ulpian. 18 ad Ed.)[44] Si magister in disciplina vulneraverit servum vel occiderit, an Aquilia teneatur, quasi damnum iniuria dederit? Et Iulianus scribit Aquilia teneri eum, qui eluscaverat discipulum in disciplina: multo magis igitur in occiso idem erit dicendum. Proponitur autem apud eum species talis: sutor, inquit puero discenti ingenuo filio familias, parum bene facienti quod demonstraverit, forma calcei cervicem percussit, ut oculus puero perfunderetur. Dicit igitur Iulianus iniuriarum quidem actionem non competere, quia non faciendae iniuriae causa percusserit, sed monendi et docendi causa: an ex locato, dubitat quia levis dumtaxat castigatio concessa est docenti: sed lege Aquilia posse agi non dubito:
>
> If a teacher kills or wounds a slave during a lesson, is he liable under the *Lex Aquilia* for having done unlawful damage? Julian writes that a man who has put out a pupil's eye in the course of instruction was held liable under the *Lex Aquilia*. There is all the more reason therefore for saying the same if he kills him. Julian also puts this case: A shoemaker, he says, struck with a last at the neck of a boy (a freeborn youngster) who was learning under him, because he had done badly what he had been teaching him with the result that the boy's eye was knocked out. On such facts, Julian says, the action for insult does not lie because he struck him not with the intent to insult, but in order to correct and teach him; he wonders whether there is an action for breach of the contract for his services as a teacher, since the teacher only has the right to administer reasonable chastisement, but I have no doubt that action can be brought against him under the *Lex Aquilia*. [Watson translation]

A summary of the text with additional information occurs elsewhere in the Digest:

> D.19.2.13.4 (Ulpian. 32 ad Ed.) Item Iulianus libro octagesimo sexto digestorum scripsit, si sutor puero parum bene facienti forma calcei tam vehementer cervicem percusserit, ut ei oculus effunderetur, ex locato esse actionem patri eius: quamvis enim magistris levis castigatio concessa sit, tamen hunc modum non tenuisse: sed et de Aquilia supra diximus, iniuriarum autem actionem competere Iulianus negat, quia non iniuriae faciendae causa hoc fecerit, sed praecipiendi.

[44] For a discussion of this text, see Honsell, H. *Quod Interest im Bonae-Fidei-Iudicium. Studien zum römischen Schadensersatzrecht* (Munich 1969), 143–144. Honsell (143) reports a third version of this text in a PSI fragment.

> Again Julianus (Dig. lib. LXXXVI.) has the following. A shoemaker, when a particular boy does his work badly, gives him such a severe blow on the head with a last that his eye is knocked out. For this the boy's father has an action on the contract, for though masters have a right to chastise in moderation, the defendant here went beyond limits. There is an Aquilian action too, as already mentioned. The action for *injuria*, Julianus says, does not lie, as the master did not act with intent to commit an *injuria*, but in the course of giving instruction. [Monro translation]

D.9.2.5.3 consists of Ulpian's interaction with the views of Julian on the availability of delictual actions for wrongful damage to property where a slave apprentice has been maimed by a teacher (and thus diminished in value). Julian reports an analogous case involving a free apprentice. In this case, apart from Aquilian liability, Julian seems sceptical whether an action on insult would succeed given the absence of intent.[45] In D.9.2.5.3, Ulpian reports that Julian raises the question whether the apprentice-master could be sued *ex locato* for breach of contract, seemingly without answering the question. In D.19.2.13.4, on the other hand, Ulpian reports that, according to Julian, an action on contract is available. The careful reader will have noted a discrepancy here.[46] This suggests a degree of textual manipulation. In this instance, breach of contract would be based on the instructor transgressing the limits of reasonable chastisement.[47] This intriguing statement raises further questions which are not explored in the text. Was the term "reasonable chastisement" written into the contract or was it merely an accepted custom which was assessed on the facts in each case?

Other than demonstrating that the contract between apprentice and instructor was one of letting and hiring, legal texts do not provide much information about the details of such an agreement. There are, however, certain indications of contractual terms which formed part of such agreements:

> D.19.2.13.3 (Ulpian. 32 ad Ed.) Si quis servum docendum conduxerit eumque duxerit peregre et aut ab hostibus captus sit aut perierit, ex locato esse actionem placuit, si modo non sic conduxit, ut et peregre duceret.
>
> If a man engages to instruct a slave, and then takes him abroad where he is captured by enemies or killed, it is held that he can be sued on the contract, provided he did not make it an express condition that he might take him abroad. [Monro translation]

45 For the extent of Aquilian liability in this case, see D.9.2.7 pr.

46 See Thomas, 1978 *Acta Juridica*, 127–155, 131–132 who thinks this is not Julian's view, but that of Ulpian. Honsell, *Quod Interest*, 144 shares a similar view.

47 Compare D.19.2.43 (Paul. 51 ad Ed.).

This text is concerned with contractual interpretation. According to Ulpian, an apprentice-master will be liable *ex locato* unless the parties had previously agreed to the slave being taken abroad as part of the apprenticing (which in turn raises interesting questions about contractual risk for damage to or destruction of the slave). This suggests the inclusion of a specific contractual provision regulating such matters. Bradley has demonstrated, with reference to the Oxyrynchite Papyri (e.g. Wisconsin Papyri 16.4, P.Oxy.724) that contracts for the instruction of slave apprentices were often surprisingly detailed and contained information such as the provision of food and clothing, the wages and the dates on which these were to be paid as well as the working hours expected of the apprentice.[48] We must therefore assume that what the Roman jurists present here is merely a generalised "normative" scenario which in reality would have been much more detailed.

2.3. *Goldsmithing and Engraving*

Academic debate[49] surrounding goldsmiths and the contract of letting and hiring is based largely on two texts by Gaius in which he discusses the classification of the contract in light of the customer's contribution of raw materials:

> Inst.Gai.3.147 Item quaeritur, si cum aurifice mihi convenerit, ut is ex auro suo certi ponderis certaeque formae anulos mihi faceret et acciperet verbi gratia denarios CC, utrum emptio et venditio an locatio et conductio contrahatur? Cassius ait materiae quidem emptionem venditionemque contrahi, operarum autem locationem et conductionem; sed plerisque placuit emptionem et venditionem contrahi. Atqui si meum aurum ei dedero mercede pro opera constituta, convenit locationem conductionem contrahi.
>
> Another borderline case: a goldsmith agrees with me to make me rings of a given weight and design. The goldsmith is to use his own gold, and the charge is to be, say, 200. Cassius holds that this is sale of the material and hire of the work. But the majority decision has been to treat the whole transaction as sale. But suppose I bring my own gold and charge is fixed for the work? It is agreed that the contract is hire. [Gordon Robinson translation]

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[48] Bradley, K. *Discovering the Roman Family: Studies in Roman Social History* (Oxford 1999), 110 and more generally chapter 5.

[49] De Robertis, *I rapporti*, 179–182; Corbino, A. "La commissione di anelli all'orefice su materiali da lui forniti" in *Nozione, formazione e interpretazione del diritto—Ricerche F. Gallo* vol. 1 (Naples 1997), 135–156, 145; Wacke, A. "*Si artifex calicem diatretum faciendum imperitia fregit.* Danni derivanti dalla rottura di gemme e di bicchieri preziosi: le clausole di sopportazione del rischio nell'artigianato romano" 2003 *SDHI* (69), 574–586, 579; Fiori, *Locatio conductio*, 206–220. See also Inst.3.24.4.

D.19.2.2.1 (Gaius 2 Cott.) Adeo autem familiaritatem aliquam habere videntur emptio et venditio, item locatio et conductio, ut in quisbusdam quaeri soleat, utrum emptio et venditio sit an locatio et conductio. Ut ecce si cum aurifice mihi convenerit, ut is ex auro suo anulos mihi faceret certi ponderis certaeque formae et acceperit verbi gratia trecenta, utrum emptio et venditio sit an locatio et conductio? Sed placet unum esse negotium et magis emptionem et venditionem esse. Quod si ego aurum dedero mercede pro opera constituta, dubium non est, quin locatio et conductio sit.

So true does it seem to be that there is a certain affinity between the two contracts that there are kinds of cases in which the question very often arises which of the two has been entered into. To take an instance:—I agree with a goldsmith that he shall make me some rings of a particular weight and fashion out of his own gold, and I give him, say, 300 sesterces; the question may be asked whether this is purchase and sale or *locatio-conductio*. It is held that it is at any rate not both, and that it is on the whole a case of purchase and sale. But if I furnish the gold myself, and a remuneration is agreed upon for labour and workmanship, then, beyond all doubt, it is a case of *locatio-conductio*.
[Monro translation]

These texts aptly demonstrate the danger inherent in a closed system of contracts which insisted that (often fluid) commercial transactions had to conform to named agreements set out in law. It has already been seen above that a similar problem was raised by Sabinus in relation to tailoring where the customer provided the tailor with fabric. In his view, it could not be a contract of letting and hiring unless the customer supplied the raw material. The same principle is applied here.[50] The classification of the agreement as a *locatio conductio* depended on the customer's contribution. Where a customer contributed raw material, it would be hire, but if a goldsmith used his own material it would be sale. As the texts show, juristic opinion on the classification of the contract where the goldsmith used his own gold was divided.[51] Cassius favoured a pluralist solution: within one transaction there could be a sale of the *materia* as well as a letting and hiring of *operae*. The unnamed majority, on the other hand, classified the transaction as predominantly (*magis*) one of sale.[52] In

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50 As will be shown in this chapter, the issue of the customer's contribution is not limited to the case of the goldsmith, but also appears in discussions on construction where the matter is resolved with reference to the principle of *accessio*, see D.18.1.20 (Pompon. 9 ad Sab.).

51 See Gröschler, P. "Die Eigentumszuordnung beim Werkvertrag: ein Vergleich" in *Usus Antiquus Iuris Romani* (Berlin 2005), 59–76, 62, 71, 74–75.

52 As to whether there was ever really a dispute about this, see Cochis, B. "Una presunta disputa di scuola in Gai.Inst.3.147" 2003 *RIDR* (3), 1–16, 16 for a sceptical view.

all likelihood, the underlying reason for the difference of opinion lay in the legal rules of the law of sale and the notion of the quality of material.[53]

A few further points deserve mention. Little information regarding contracts of this kind can be extracted from Roman legal texts. Given the nature of the contract, it seems fair to assume that the parties had to agree on the *merces* and the *operae* (the manufacture of the rings). It also seems likely that more detail would have been included since the texts mention weight and design as well as an agreement on the amount. It is not impossible that a form of *probatio* may have been included in contracts of this kind, but none of the texts mention it.

Let us compare the case of the engraver. There are great similarities with the case of the goldsmith. In the case of the engraver, he is similarly handed raw material in a sense (a jewel) on which to perform further skilled work:

> D.19.2.13.5[54] (Ulpian. 32 ad Ed.) Si gemma includenda aut insculpenda data sit eaque fracta sit, si quidem vitio materiae factum sit, non erit ex locato actio, si imperitia facientis, erit. Huic sententia addendum est, nisi periculum quoque in se artifex receperat: tunc enim etsi vitio materiae id evenit, erit ex locato actio.
>
> A gem is entrusted to a workman to set or cut, and it gets broken;—if the breakage is due to a flaw in the gem itself, there is no action on the contract, but if to want of skill on the part of the workman, an action lies. This statement is incomplete [in the former case] without the additional words "unless the workman actually assumed the risk," as, if he did, there will be an action on the contract even if the mischief happened from a flaw in the gem.
>
> [Monro translation]

This text is about *periculum* and the rule proposed by Ulpian divides the contractual risk depending on whether the loss was caused by a *vitium materiae* or by the craftsman's lack of skill: *imperitia* (read *culpa*). As far as the inexperience of the engraver is concerned, it is well established from D.19.2.9.5 that inexperience counts as fault in the case of a craftsman as he

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[53] Monro, *Digest XIX, 2*, 2 note 1 expresses it differently: "There are two grounds on which the distinction was of some practical importance. A vendor held to give a tacit warranty of quiet enjoyment and was liable to penal damages. D.21.2.19.pr. It was also necessary, if an action was brought, for the plaintiff to make a formal statement of the nature of the ground of action. D.2.13.1.pr."

[54] This text and especially the final sentence (*Huic ... actio.*) has been subjected to intense scrutiny, see Van den Bergh, 1975 *TvR* (43-1), 59–72, 69–70; Fiori, *Locatio conductio*, 53 note 164.

is expected to behave professionally (*ut artifex*).[55] The final part of the text shows that the default rule could be altered by contractual agreement.[56] There will be no *actio locati* if the stone, supplied by the customer, broke owing to a flaw in it. A loss of this kind did not occur due to the fault of the engraver. It therefore cannot be attributed by law to him and falls to the customer unless the craftsman had expressly assumed the risk in the contract.[57] Martin has suggested that for such a division of risk to function, there must have been an inspection of the jewel before the contract was concluded.[58] She has also suggested that there must have been a final evaluation of the quality of the work similar to a *probatio* in construction contracts.[59] This is a tantalising notion and highly plausible, even though the texts do not mention it.

The assumption of risk by means of contractual provision is explicitly considered in the following text:

> D.9.2.27.29 (Ulpian. 18 ad Ed.) Si calicem diatretum faciendum dedisti, si quidem imperitia fregit, damni iniuria tenebitur: si vero non imperitia fregit, sed rimas habebat vitiosas, potest esse excusatus: eti deo plerumque artifices convenire solent, cum eiusmodi materiae dantur, non periculo suo se facere, quae res ex locato tollit actionem et Aquiliae.
>
> If you hand over a cup for filigree work to be done, the jeweller will be held liable if he breaks it through lack of skill, but if he breaks it not through his lack of expertise but because it has weakening cracks he can be exonerated; and accordingly craftsmen usually contract when things of this sort are entrusted to them that the work shall not be done at their risk, and this provision excludes their liability both under the contract for their professional services and under the *lex Aquilia*. [Watson translation]

This text follows the same division of risk as set out above. Where the craftsman's lack of skill caused the damage to the cup, he is liable *ex locato*. Where the damage was caused by a *vitium materiae* (in this case weakening cracks), he is not liable. Ulpian's reference to the express assumption of

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55 The default standard of contractual liability in the case of manufacture can be seen in D.9.2.27.35 (Ulpian. 18 ad Ed.).

56 Wacke, 2003 *SDHI* (69), 574–586, 582 indicates that this could be done through a *pactum adiectum*.

57 Mayer-Maly, *Locatio conductio*, 193–194; Wacke, 2003 *SDHI* (69), 574–585, 578–579. Vacca, L. "Considerazioni in tema di risoluzione del contratto per impossibilità della prestazione e di ripartizione del rischio nella locatio conductio" in *Scritti in onore di Mario Talamanca* (Naples 2001), 247–296, 273–275 argues that the rules regarding risk developed organically on a case-by-case basis.

58 Martin, S.D. "*Imperitia*: The Responsibility of Skilled Workers in Classical Roman Law" 2001 *AJPH* (122) 107–129, 119.

59 Martin, 2001 *AJPH* (122), 107–129, 124.

contractual risk is further explained here with reference to commercial custom. Craftsmen usually contract out of it, possibly because it is not possible to determine the quality of the material from which the cup was made and how it will respond to further work being done on it.

2.4. *Construction*

The construction and alteration of buildings using the contract letting and hiring was a fertile source for juristic discussion.[60] Although construction is discussed in a number of legal texts, only a handful of concrete examples may be identified.[61] The cases examined by the jurists have a hypothetical feel to them and are likely "normative". It seems safe to assume that the size and the nature of the project would have affected the complexity of the agreement. Since no example of a construction contract governed by Roman private law has survived, it is almost impossible to speculate about the contractual conventions in this area of law or about clauses commonly inserted.[62]

Roman legal texts provide little information about the parties to the contract. Most texts assume that the contractor was a free person, but the presence of servile contractors cannot be excluded. Although there are few traces of this in the texts, it must be assumed that a contractor used a mixture of skilled and unskilled workers.[63]

There is evidence to suggest that in Roman law a customer (*locator*) could put out a construction project "to tender". Little is known about this process and it is assumed to have emulated state practice where construction projects were let out to private contractors at public auction. In state auctions successful bidders had to demonstrate to the magistrate in charge that they had sufficient sureties to cover the cost of the project and it is not inconceivable that similar issues would have affected the choice of contractor in private contracts.[64] One text provides some information:

[60] Martin, *Private Building*, 19 shows that *stipulatio* and *locatio conductio* were most commonly used as construction contracts. For an overview of the architectural process, see Taylor, R. *Roman Builders—A Study in the Architectural Process* (Cambridge 2000) generally.

[61] Martin, *Private Building*, 89 shows that legal disputes about construction usually concern one of two matters, namely disputes concerning the contract and financial loss arising from complete or partial destruction of the property through *vis maior*.

[62] See Martin, *Private Building*, 52–62; Rainer, J.M. "Zur *Locatio conductio*: Der Bauvertrag" 1992 *ZSS* (rA) (109), 505–525, 505.

[63] Martin, *Private Building*, 62–72; Compare Brunt, P.A. "Free Labour and Public Works at Rome" 1980 *JRS* (70), 81–100, 87–88. See also Rainer, J.M. "Bauen und Arbeit im klassischen römischen Recht" 1990 *ZSS* (rA) (107), 376–381.

[64] See Martin, *Private Building*, 131–136. See also Du Plessis, P.J. "The Protection of the

> D.19.2.60.4 (Lab. 5 Post. a Iavolen. Epit.) Mandavi tibi, ut excuteres, quanti villam aedificare velles: renuntiasti mihi ducentorum impensam excutere: certa mercede opus tibi locavi, postea comperi non posse minoris trecentorum eam villam constare: data autem tibi erant centum, ex quibus cum partem impendisses, vetui te opus facere, dixi, si opus facere perseveraveris, ex locato tecum agere, ut pecuniae mihi reliquum restituas.
>
> I commissioned you to make an estimate how much you would be willing to build a house for: you informed me that you made the cost come to 200: thereupon I ordered you to undertake the work for a specified sum [viz. 200], but I subsequently discovered that the house could not be built for less than 300: in the meantime 100 had been paid to you in advance, and you had spent a portion of this sum, but I desired you not to go on with the work. My (sic) opinion was that if you still insist on continuing with the work, I have an action against you on the contract in which I can recover the balance of the 100. [Monro translation]

In this text the customer asked the builder for an estimate of the construction costs with a view to settling a price for the project.[65] This was done using the contract of mandate. The parties agreed on the price (*certa merces*) and the project commenced. Payment would be made in three instalments (a common contractual convention in construction contracts).[66] After the first instalment had been paid, it became apparent that the project could not be completed for the sum quoted and the customer intervened to stop the project. According to Labeo/Iavolenus, the customer could use the *actio locati* to reclaim the money not yet spent if the builder continued.[67] Martin has suggested that the customer took a fairly drastic course of action by stopping the project.[68] This may be true, but it also demonstrates two important aspects of the contract of letting and hiring. First, there is the fundamental importance of consent. For the contract to come into existence, the parties had to agree on all aspects of the contract (*merces* and *operae*).[69] Since consent on these issues was a continuous element of the contract, a fatal disturbance such as a realisation that the project could not be completed for the sum quoted, terminated the consent and permitted the customer to

Contractor in Public Works Contracts in the Roman Republic and Early Empire" 2004 *JLH* (25), 287–314.

65 For a discussion of this text, see Martin, *Private Building*, 118–120.

66 For common modes of payment, see Martin, *Private Building*, 31.

67 Compare C.4.65.2 (a. 213). The reason for limiting the action to the amount of money not yet spent was because there was no *culpa* on the part of the builder in constructing the building.

68 Martin, *Private Building*, 118–120.

69 Martin, *Private Building*, 20, 29, 31.

withdraw from the agreement. By continuing until the next payment was due, the customer would in effect be agreeing tacitly to the builder's continuating of the project. In second place, the mode of payment was clearly designed to minimise the customer's exposure to contractual risk. By releasing money in stages, the customer could maintain some control over the quality of the project as it progressed.

As far as the description of the project is concerned, the Puteoli inscription (a record of a contract for the alteration of a wall from 105 BCE) shows that contractual provisions could be quite detailed.[70] We must assume that, depending on the complexity of the project, similarly detailed provisions were included in private building contracts. Roman legal texts provide some information concerning common contractual provisions.

As we have previously seen in D.18.1.20 (Pompon. 9 ad Sab.), Sabinus mentioned that it could not be a contract of letting and hiring unless the customer provided the raw materials. This statement was juxtaposed against an example of construction where, according to Sabinus, it was sufficient for the customer (*locator*) to provide the site where the building would be erected, since (by implication), the building once erected adhered inseparably to the principal object, the land. This would suggest that, in cases of construction, unlike the cases of movable propery discussed before, the provision of building material by the customer was not a requirement for the contract to be classified as *locatio conductio*. The following text by Paul supports this view:

> D.19.2.22.2[71] (Paul. 32 ad Ed.) Cum insulam aedificandam loco, ut sua impensa conductor omnia faciat, proprietatem quidem eorum ad me transfert et tamen locatio est: locatio enim artifex operam suam, id est faciendi necessitatem.
>
> If I engage to have a block of chambers built, the contractor to do everything at his own expense, the latter transfers the property in whatever he builds to me, nevertheless his act is a *locatio* (letting out) for the builder lets out his labour, in short [he gives me the benefit of] his ability to do the job.
>
> [Monro translation]

The agreement is an example of an unusual contractual agreement, hence Paul's comment that it is … *et tamen locatio est*.[72] The question why it was

[70] Martin, *Private Building*, 30–32.

[71] Thomas, J.A.C. "Reflections on Building Contracts" 1971 *RIDA* (18), 673–689, 676; Martin, *Private Building*, 36; Rainer, 1992 *ZSS* (rA) (109), 505–525, 506–507.

[72] Thomas 1971 *RIDA* (18), 673–689, 676–677 has rightly observed that in cases of this kind where the the builder provided the material it would have affected the amount of *merces* on which the parties agreed.

unusual is likely because the contractor supplied the building materials and undertook *omnia sua impensa*. This constituted a deviation from the principle established in relation to movable goods in D.18.1.20 above. To assess whether it was a common contractual convention for the builder to supply the building materials, we must examine the following two texts:

> D.19.2.30.3 (Alfen. 3 Dig. a Paulo Epit.) Qui aedem faciendam locaverat, in lege dixerat: 'quoad in opus lapidis opus erit, pro lapide et manupretio dominus redemptori in pedes singulos septem dabit': quaesitum est utrum factum opus an etiam imperfectum metiri oporteret. Respondit etiam imperfectum.
>
> A person who engaged with another to build a house inserted the following term in the contract: "so far as any stone shall be required for the work, the employer is to give the contractor 7 sesterces a foot for the stone and the labour": the question asked was whether measurement should be made only when the work was completed or while it was in progress as well. Answer: While it was in progress as well. [Monro translation]

> D.6.1.39 pr (Ulpian. 17 ad Ed.). Redemptores, qui suis cementis aedificant, statim cementa faciunt eorum, in quorum solo aedificant.
>
> Contractors who build with their own stones make them immediately the property of the owners of the ground on which they build.
> [Watson translation]

D.19.2.30.3 is interesting for three reasons. First, it provides a rare verbatim account of a clause in a construction contract (… *quoad … dabit.*). Secondly, as Martin has pointed out, it probably refers to specalist stonemasonry rather than unskilled work.[73] Finally, this text contains the earliest reference to an agreement that payment would be made *per pedes mensurasve* rather than in installments as mentioned above.[74] Assuming therefore that this text expresses the view of Alfenus, it demonstrates that already during the late Republic it was common for the builder to use his own building materials. That this practice continued throughout the classical period is confirmed by D.6.1.39 pr.

The time period for the construction project (*dies operis*) seems to have been customarily fixed by the parties in the *lex* as in D.19.2.13.10 (Ulpian. 32 ad Ed.) and D.19.2.24 pr (Iulian. 15 ad Dig.).[75] Where a term had been agreed, the customer had to wait for the builder to default before using the

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73 Martin, *Private Building*, 115–117.
74 Martin, *Private Building*, 106.
75 Martin, *Private Building*, 74–75, 124.

actio locati.[76] Parties did not always agree on a time period. In such cases, when difficulties arose, the matter had to be resolved through contractual interpretation as in D.19.2.58.1 (Lab. 4 Post. a Iavoleno Epit.).[77] Here, in the absence of a clear agreement on the time frame, a judge had to interpret the contract. Martin has suggested that this may have involved a twofold process, namely first by ascertaining a reasonable period of time for the performance of a task of this kind and then measuring the extent to which the actual performance has deviated from it.[78] This certainly seems compatible with the requirement of *bona fides*.

As for the cost of the project, D.19.2.60.4 shows one way in which the parties arrived at an agreed price (using the contract of mandate before concluding a contract of letting and hiring). It is evident, however, that costs could vary during the build as in D.19.2.30.3. It is unclear how the parties coped with fluctuations in cost, but presumably the rule of thumb was whether such fluctuations were "reasonable" in other words in good faith and whether they could be said to be compatible with the consent at the heart of the contract.[79] It is clear from the text discussed thus far that there were different forms of payment in construction. Payment was linked to approval of the quality of the project and was, as Martin has explained, linked to the issue of contractual risk. In contracts of this kind, contractual risk was linked by the Roman jurists to the approval of the work by the customer (*probatio operis*).[80] Approval involved a two-stage process, namely acceptance of the work and the acknowledgement that it was satisfactory.[81] Let us examine the following text:

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[76] Martin, *Private Building*, 74.

[77] On this text and whether it contains the views of Labeo or that of Iavolenus, see Martin, *Private Building*, 75.

[78] Martin, *Private Building*, 75, 77–78.

[79] See, for example, D.19.2.51.1 (Ulpian. 32 ad Ed.) where the payment is agreed to be given *in singulos dies*. Thomas, 1971 *RIDA* (18), 673–689, 678 has observed that such an arrangement suggests a greater level of supervision over the contract.

[80] On this, see Thomas, 1971 *RIDA* (18), 673–689, 677 and extensively Martin, S.D. "A Reconsideration of *probatio operis*" 1986 *ZSS* (rA) (103), 321–337. See Jakab, *Risikomanagement*, 250–251. See more recently Jakab, E. "Vertragsformuläre im *Imperium Romanum*" 2006 *ZSS* (rA) (123), 71–101 and Buchwitz, W. "Vertragsklauseln und *probatio*—Anmerkungen zum römischen Bauvertragsrecht" 2009 *ZSS* (rA) (126), 358–386.

[81] Thomas, 1971 *RIDA* (18), 673–689, 678–679 has observed that the approval had to be fair and objective, even where done by a third party. It had to be free of fraud and had to refer only to the quality of the work. See specifically D.19.2.24 pr (Paul. 34 ad Ed.) and on this text, Thomas, 1971 *RIDA* (18), 673–689, 688–689. See also Zimmermann, *Obligations*, 404–406.

D.19.2.36 (Florentin. 7 Inst.)[82] Opus quod aversione locatum est donec adprobetur, conductoris periculum est: quod vero ita conductum sit, ut in pedes mensurasve praestetur, eatenus conductoris periculo est, quatenus admensum non sit: et in utraque causa nociturum locatori, si per eum steterit, quo minus opus adprobetur vel admetiatur. Si tamen vi maiore opus prius interciderit quam adprobaretur, locatoris periculo est, nisi si aliud actum sit: non enim amplius praestari locatori oporteat, quam quod sua cura atque opera consecutus est.

When works are contracted for *per aversionem*, they are at the risk of the contractor (*conductor*) until they are ascertained to correspond with the terms of the contract; but if the agreement is that the work is to be done in accordance with specific provisions as to form, dimensions, &c. [*per pedes mensurasve*] then the risk is borne by the contractor until measurement is made, but no longer; and in both cases the employer (*locator*) is responsible if the business of ascertaining the sufficiency of the work or of measuring the different portions should be hindered through his fault. If however the work should be destroyed by *vis major* before the sufficiency is ascertained, the loss falls on the employer for he has no right to claim to be any better off than he would have been if he had used his own diligence and exertions.

[Monro translation]

Probatio operis could take one of two forms. Where the parties had agreed that the builder undertake construction *per pedes mensurasve* (or *per singulos dies*), the approval of the work at the agreed stages constituted approval and also triggered payment. Where the parties had agreed that approval would occur *per aversionem*, on the other hand, approval occurred outright at the end of the project.[83] The legal consequence of the formal approval was that it shifted the risk of accidental destruction onto the customer.[84] A consequence of the approval is that the contractor became entitled to the full payment as agreed.[85] The same idea is continued in the text which follows directly after:

D.19.2.37[86] (Iavolen. 8 ex Cass.) Si, priusquam locatori opus probaretur, vi aliqua consumptum est, detrimentum ad locatorem ita pertinet, si tale opus fuit, ut probari deberet.

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82 On this text see De Robertis, *I rapporti*, 169; Thomas, 1971 *RIDA* (18), 673–689, 683–685; Rainer, 1992 *ZSS* (rA) (109), 505–525, 514; Martin, *Private Building*, 96; Fiori, *Locatio conductio* 230 and Vacca, *Considerazioni*, 271–272 as well as Babusiaux, U. *Id quod actum est—Zur Ermittlung des Parteiwillens im klassischen römischen Zivilprozeß* (Munich 2006), 233.

83 For a recent discussion of *per aversionem*, see Jakab, *Risikomanagement*, 248–258.

84 Thomas, 1971 *RIDA* (18), 673–689, 677, 680.

85 Thomas, 1971 *RIDA* (18), 673–689, 681.

86 Vacca, *Considerazioni*, 270.

> If before the employer is satisfied of the sufficiency of the work, it is forcibly destroyed, he only has to bear the loss if as a matter of fact the performance was such that he would have been bound to approve it.
>
> [Monro translation]

Thomas has pointed out that it is impossible to say from this text whether the view is that of Cassius or of Iavolenus.[87] It is clear that this text is meant to qualify the statement introduced towards the end of D.19.2.36 about risk. According to D.19.2.37, the locator will only carry the risk, where the object has been destroyed before *probatio* by *vis maior*, "*si tale opus fuit, ut probari deberet.*" Monro justifies this qualification as follows: "… when I say 'is shown to be in accordance' I should rather say 'actually was in accordance,' and it is enough if it is established by sufficient evidence after the mischief that this was the case."[88] In other words, the work performed by the *locator* was already so substantially in accordance with the provision of the contract that, save for the *vis maior* intervening, the customer would have been obliged to approve it.

Since, as has been shown in chapter one, the rules on risk were still developing for much of the classical period, it should come as little surprise that they occasionally gave rise to juristic controversy. Take the following text:

> D.19.2.62 (Lab. 1 Pith.)[89] Si rivum, quem faciendum conduxeras et feceras, antequam eum probares, labes corrumpit, tuum periculum est. PAULUS: immo si soli vitio id accidit, locatoris erit periculum, si operis vitio accidit, tuum erit detrimentum.
>
> If you engaged to make a watercourse and made it, but, before you ascertained that it was in accordance with the contract it was destroyed by an earthquake, you (*conductor*) must bear the loss. Paulus: I would rather say that the employer (*locator*) must bear the loss if the mischief is owing to the faulty nature of the soil, but if it occurs thought a fault in the work, you must bear it. [Monro translation]

This text has been studied extensively. The reason for this is the complexity of the views contained in it. Labeo introduces the first rule—before *probatio*

[87] Thomas, 1971 *RIDA* (18), 673–689, 684. On this text, see also Rainer, 1992 *ZSS* (rA) (109) 505–525, 515.

[88] Monro, *Digest XIX, 2*, 53 note on 36 towards the end.

[89] For an overview of the literature, see Fiori, *Locatio conductio*, 134 note 27. See also extensively, Rainer, 1992 *ZSS* (rA) (109), 505–525, 518 and Martin, 1986 *LHR* (4), 423–437. See also Cardilli, *L'Obbligazione di 'praestare'*, 337–347.

operis, the contractual risk lies with the builder (*conductor*). Since this rule seems to contradict statements in other texts where loss caused by *labes* is deemed to reside with the *locator*, there have been many attempts to explain this contradition and to establish whether *labes* should be classified as *vis* or *vitium*.[90] The second part of the text, an addition by the jurist Paul, introduces a more nuanced rule. Whereas Labeo assigned the risk to the *conductor* as a matter of course, Paul proposed a distinction between *vis* and *vitium* whereby, before *probatio*, the customer (*locator*) bore the risk for *vis* and the builder (*conductor*) for *vitium*. A similar rule is visible in the follwing text:

> D.19.2.59 (Iavolen. 5 Post. Lab.).[91] Marcius domum faciendam a Flacco conduxerat: deinde operis parte effecta terrae motu concussum erat aedificium. Massurius Sabinus, si vi naturali, veluti terrae motu hoc acciderit, Flacci esse periculum.
>
> Marcius contracted to build a house for Flaccus: but before completion the building was shattered by an earthquake. According to Massurius Sabinus, the accident taking place by natural agency, for example, such as described, the loss must fall on Flaccus. [Monro translation]

Here, a structure was destroyed before *probatio* by an earthquake which is classified by the jurist Massurius Sabinus as *vis naturalis*.[92] These texts show, as already set out in chapter one, that the concept of risk was still developing throughout the classical period and that the jurists at times held conflicting opinions about the assignement of risk. It also demonstrates that modern scholars should not cling too dogmatically to the terms *vis* and *vitium*. The Roman jurists merely used them as broad terms to convey as sense of where risk fell and within these broad terms much discussion occurred about specific incidents and whether they were *vis* or *vitium*.

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[90] Thomas, 1971 *RIDA* (18), 673–689, 680–682; Rainer, 1992 *ZSS* (rA) (109) 505–525, 525; Martin, *Private Building*, 91–92. See most recently Vacca, *Considerazioni*, 267, 428–429.

[91] There are some problems with this text and it has been suggested that a dissenting opinion, possibly by Labeo, was removed from the end of the text, see Martin, *Private Building*, 93.

[92] On this, see Fiori, *Locatio conductio*, 97 note 122.

3. Letting and Hiring of *Operae* Which Involves the Movement of the Property of One of the Contracting Parties

A small number of Roman legal texts are concerned with the carriage of goods or passengers in return for money. Apart from specific matters such as "maritime insurance" for goods, the legal rules developed in the context of the contract of letting and hiring to deal with the transport of goods did not differ substantially from those on the transport of passengers. In fact, many texts suggest that most forms of transport carried both goods and passengers. For that reason, a distinction will not be drawn between carriage of goods and of passengers as is done in modern law. Rather, the texts will be divided into three categories which reflect the modality of transport, namely a) by land; b) by water and finally c) an unspecified category where the modality cannot be determined.

3.1. *Carriage by Land*

Roman legal texts make scant reference to land transport in the context of letting and hiring. The reason for this most likely lies in the fact that land transport was of lesser economic significance than transport by water and therefore did not rouse the interest of the Roman jurists to the same extent.[93] Where land transport is mentioned, it occurs mostly with reference to goods rather than passengers, though there is evidence that passengers used rented land transport for travel.[94] In two insightful contributions, Martin has shown that the contract of letting and hiring could be used for land transport in one of two ways.[95] Either the customer (*locator*) could let out the task of transport to a carrier (*conductor*) who assumed legal responsibility for the completion of the task, or the customer could rent the components (mules/camels and drivers) to complete the task personally

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[93] Martin, S.D. "*Servum meum mulionem conduxisti*: Mules, Muleteers and Transportation in Classical Roman law" 1990 *TAPhA* (120), 301–314, 301–302; Martin, S.D. "Roman law and the study of land transportation" in *Speculum Iuris* (Ann Arbor, Mich. 2002) 151–168, 152 where the author has noted that it is difficult to draw any socio-economic conclusions from the legal texts on transport. For an example of land transport, see Jones, D. *The Bankers of Puteoli: Finance, Trade and Industry in the Roman World* (Stroud 2006), 166 concerning the grave inscription of a cloak merchant who transported his wares across the Alps by mule train.

[94] See Horace, *Sat.* 1.5 for the famous (perhaps fictional) journey which Horace and Virgil undertook to Brundisium.

[95] Martin, *Roman law*, 154.

or through his slaves/employees.[96] In the former case, the carrier normally used his own vehicles and workers required to complete the task and any contracts which he entered into with third parties did not generate contractual liability for the customer.[97] In the latter case, the arrangement was a *locatio conductio rei* and will be discussed in chapter three. The choice between these two modes of contracting would have been determined by a number of factors including the complexity of the task and the preferences of the parties.[98]

The following text is the only example of land transport using letting and hiring in Roman legal sources:

> D.19.2.13 pr (Ulpian. 32 ad Ed.)[99] Item quaeritur, si cisiarius, id est carucarius, dum ceteros transire contendit, cisium evertit et servum quassavit vel occidit. Puto ex locato esse in eum actionem: temperare enim debuit; sed et utilis Aquiliae dabitur.
>
> A further question. Suppose a carman in his efforts to outstrip all others, upsets the vehicle and crushes or kills a slave [of the owner's]. I should say he is liable to an action founded on the contract, as he was bound under it to be less impetuous: but the party letting can have an *utilis Aquilia* if he likes.
>
> [Monro translation]

The main focus of this text is Aquilian liability for wrongful damage to property. The term *cisiarius* is a hapax legomenon in the Digest and refers, as Martin has shown, to the driver of a lightweight two-wheeled chariot commonly found at city gates.[100] Individuals could contract with a charioteer to transport their goods and/or themselves for short distances. Nothing more is known about the terms of such agreements nor is it possible to determine the status of the charioteer. Assuming that the slave was the passenger in the chariot, his owner would have an action *ex locato* against the charioteer for breach of contract (failing to complete the task professionally). The phrase … *temperare enim debuit* suggests a contextualised approach to *culpa*. A *utilis* version of the aquilian action is available because the driver of the chariot did not "kill using the direct application of bodily force" as required by the statutory version of the *actio legis aquiliae*; he merely

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96 Martin, 1990 *TAPhA* (120), 301–314, 304 for an overview of texts. Compare D.19.2.30.2 (Alfen. 2 Dig. a Paulo Epit.).

97 Martin, *Roman law*, 154.

98 Martin, 1990 *TAPhA* (120), 301–314, 303.

99 See Thomas, J.A.C. "*Actiones ex locato/conducto* and Aquilian liability" 1978 *Acta Juridica*, 127–155, 130–131; Vigneron, R. "La conception originaire de la *locatio conductio* romaine" in *Mélanges Felix Wubbe* (Fribourg 1993), 509–524, 518–519.

100 Martin, *Roman Law*, 155.

furnished a cause of death.[101] This text is often discussed with reference to another in which land transport using the contract of letting and hiring is implied, namely the famous pile-up on the Capitoline hill in D.9.2.52.2 (Ulpian. 2 Dig.).[102] While this latter text is insightful in as much as it provides information regarding Aquilian liability, it adds little to the discussion on the contract of letting and hiring apart from the fact that in this case it would appear that the mule-drivers had been rented to complete a task (ferry goods up the Capitoline hill).[103]

From these two examples, it seems clear that Roman legal texts provide an incomplete and likely "normative" picture of transport by land using the contract of letting and hiring in the Roman Empire.[104] The example provided in these texts is of small-scale transport by land which would undoubtedly have differed in legal complexity from large-scale transport if examples from other industries are anything to go by. Given the lack of juristic attention and the fact that no contract has been preserved on this topic, it is virtually impossible to speculate about matters such as the typical provisions which would have formed part of such an agreement and whether a verbal or written document was the convention.

3.2. *Carriage by Water*

Most Roman legal texts concerned with the transport of goods and passengers by water using the contract of letting and hiring have a maritime context.[105] As with land transport, maritime transport using the contract of letting and hiring could take one of two forms.[106] Either the customer (*locator*) let out the transport of goods or passengers as a task to a carrier (*conductor*) who assumed legal responsibility for achieving the outcome or the customer rented the components (ships and crew) to transport goods or passengers personally or using his slaves/employees.[107] The latter

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[101] Thomas, 1978 *Acta Juridica*, 127–155, 130–131.

[102] Martin, *Roman Law*, 155–156.

[103] Compare also D.19.2.60.8 (Lab. 5 Post. a Iavoleno Epit.) where a carriage was hired to transport goods.

[104] Compare, for example, the much fuller picture which emerges from the excellent work by Adams, C. *Land Transport in Roman Egypt: a Study of Economics and Administration in a Roman Province* (Oxford 2007) for a survey of the papyri.

[105] There is a single legal text, D.19.2.13.1 (Ulpian. 32 ad Ed.) that mentions river transport explicitly.

[106] For Greek comparison, see Jakab, E. "Risikomanagement bei den *Naukleroi*" in *Antike-Recht-Geschichte* (Frankfurt am Main 2009), 73–88.

[107] Meyer-Temeer, A.J.M. *Die Haftung der Schiffer im griechischen und römischen Recht* (Zuthpen 1978), 150 has argued that although designated goods and passenger ships seem

arrangement is a *locatio conductio rei* and will be discussed elsewhere.[108] As Robaye has shown, the modality chosen by the parties would likely have been dictated by the level of risk to which the parties wanted to expose themselves.[109]

To understand the complexities surrounding maritime transport in Roman law, certain introductory observations about terminology are required. The terms commonly found in legal texts on the subject include the ship owner (*dominus navis*), the shipper (*exercitor*), the master of the ship (*magister navis*) and the helmsman (*gubernator*).[110] Depending on the size of the vessel, it seems that more than one function could be performed by the same person. Compare, for example, Ulpian's statement in D.14.1.1.5 (Ulpian. 28 ad Ed.) that the term *magister navis* could refer to someone appointed by the shipper (*exercitor*) or by the ship owner (*dominus navis*) without the knowledge of the shipper and in D.14.1.1.15 where he notes that the term shipper (*exercitor*) could refer to the owner of the ship (*dominus navis*) or to someone who has rented the ship from the owner.[111] In its most straightforward form, the management structure of a ship was as follows. The shipper (*exercitor*) (as *conductor*) rented the ship from its owner (*dominus navis*) *per aversionem ... vel ad tempus vel in perpetuum*.[112]

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to have existed in the Roman Empire, some ships could carry a combination of goods and passengers. See also Cerami, *Diritto*, 257–258. Gaurier, D. *Le droit maritime romaine* (Rennes 2004), chapter 3 examines the modes of contracting relating to shipping. See also Rathbone, D. "The Financing of Maritime Commerce in the Roman Empire, I–II AD" in *Credito et moneta nel mondo romano* (Bari 2003), 197–229, 210 and Jakab, *Naukleroi*, 8–9.

108 It was of course also possible to rent spaces for cargo or passengers on a ship. I included these (tenatively) under *locatio conductio rei* as it was in fact no different from renting a space in a warehouse or grainstore, but much would have depended on the parties' agreement.

109 Robaye, *L'Obligation*, 50. See Gaurier, *Le droit maritime*, chapter 2 for the modes of renting a ship.

110 D.14.1.1.1–2 (Ulpian. 28 ad Ed.); Cerami, *Diritto*, 53–56, 322; Gaurier, *Le droit maritime*, chapter 3. Jones, *Bankers*, 177–178 also mentions that hiring a ship was cheaper than constructing your own.

111 See D.14.1.1.15 (Ulpian. 28 ad Ed.) Exercitorem autem eum dicimus, ad quem obventiones et reditus omnes perveniunt, sive is dominus navis sit sive a domino navem per aversionem conduxit vel ad tempus vel in perpetuum.

"Ship-owner" in this connection designates the person to whom all the income and revenues come, even if he does not actually own the ship: He may have hired it from the owner for a lump sum or for a fixed term or without a limit of time. [Watson translation]. On this see also Robaye, *L'Obligation*, 67–68. It is worth pointing out that there is a thin line between a "perpetual lease" and "ownership" of a ship.

112 Meyer-Temeer, *Die Haftung*, 150, 153. Jones, *Bankers*, 175 observes that most *exercitores* would have been "venture capitalists".

He held the business capital for the venture and appointed the *magister navis* who was charged with the daily running of the vessel.[113]

Almost nothing is known about the contract between *dominus navis* and *exercitor* apart from the fact that it was classified as letting and hiring.[114] In all likelihood, it would have been a *locatio conductio rei* with the aim to exploit the object of lease (the ship) financially (*frui*) for a specified period of time. One may speculate, using the example of the *insula* which will be discussed in chapter three, that the *exercitor* paid annual instalments at the start of the financial year and then "clawed-back" his expenses by charging customers to transport goods or passengers, but this is not mentioned in the texts.

As far as the relationship between *exercitor* and *magister navis* is concerned, much would have depended on the status of the latter. If the *magister navis* was a free person, the relationship would have been one of "employment" created either by a *stipulatio*, a mandate or a contract of letting and hiring.[115] This would have had an impact on the scope of the contractual liability of the *exercitor navis*:

> D.14.1.1.3 (Ulpian. 28 ad Ed.) Magistri autem imponuntur locandis navibus vel ad merces vel vectoribus conducendis armamentisve emendis: sed etiamsi mercibus emendis vel vehendis fuerit praepositus, etiam hoc nomine obligat exercitorem.
>
> The captain is appointed to hire out the ship for the carriage of cargo, to take on passengers, or to purchase provisions or equipment; but even if he buys and sells cargoes, this will bind the shipowner if the captain was appointed for that purpose. [Watson translation]

It is difficult to ascertain the status of the *magister navis* from this text, but it was most likely a free person. The actions of the master of the ship generated liability for the *exercitor navis* in his own name under the *actio exercitoria*.[116] The reason for this lies in the nature of the relationship between *exercitor* and *magister navis*. Most texts imply the appointment of a *magister navis* as an *institor* or business agent and such an appointment was usually accompanied by a document termed the *lex praepositionis* which set out the scope of the master's authority.[117] The texts also suggest that such authority was

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113 Meyer-Temeer, *Die Haftung*, 153; Rathbone, *Maritime Commerce*, 205; Jones, *Bankers*, 175.

114 Rathbone, *Maritime commerce*, 205 speculates on the levels of wealth required to own a ship.

115 See Cerami, *Diritto*, 239–247 and D.14.1.19–20 (Ulpian. 28 ad Ed.).

116 For the extent of his liability, see Meyer-Temeer, *Die Haftung*, 178; Jones, *Bankers*, 107.

117 See D.14.1.1.12 (Ulpian. 28 ad Ed.) and in D.14.1.1 pr (Ulpian. 28 ad Ed.).

limited.[118] A parallel may be drawn here with the case of the fuller and his apprentices. The *magister navis* was closer to an *institor* than a *procurator*, which explains why liability attaches to the *exercitor navis*.

Aside from identifying the contracts between customers and *magister navis* as one of letting and hiring, little information is known. One text suggests that arrangements between the parties could be fluid, thus making it difficult to ascertain the nature of the contract when litigation arose:

> D.19.5.1.1 (Papin. 8 Quaest.)[119] Domino mercium in magistrum navis, si sit incertum, utrum navem conduxerit an merces vehendas locaverit, civilem actionem in factum dandam esse Labeo scribit.
>
> Labeo writes that a civil-law *actio in factum* should be given to the owner of the cargo and against a ship captain when it is unclear whether he hired the ship or leased out the transporting of cargo [as a job]. [Watson translation]

This text illustrates the problem of classification sometimes encountered by the Roman jurists when attempting to place the fluid agreements of parties into pre-established Roman contractual categories. The question posed by this text is how to deal with an agreement that could be either *locatio conductio rei* or *locatio conductio* of *operae*. Since there was clearly an agreement between the parties, but one which could not be properly defined, Labeo opted for an *actio in factum*, that is the *actio praescriptis verbis*.

No example of a contract for the transport of goods or passengers by sea has survived and it is impossible to speculate whether contracts of this kind were customarily verbal/written and what the common provisions in such agreements would have been.[120] More specifically, it is not clear how the goods would have been transported onboard a ship and whether they were stored in individual compartments (and thus could be clearly identified) (compare the renting of storage space in a warehouse) or whether they were stored in bulk (and thus could not be clearly identified and in which case a transfer of ownership to the shipper might have been preferable).[121]

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118 D.14.1.1.2 and D.14.1.1.7 (both Ulpian. 28 ad Ed.). Compare also Inst.Gai. 4.71 and D.14.1.1.17 (Ulpian. 28 ad Ed.). Cerami, *Diritto*, 54, 56 and D.14.3.11.3 (Ulpian. 28 ad Ed). See also Robaye, *L'Obligation*, 69–70.

119 Thomas, J.A.C. "Carriage by Sea" 1960 *RIDA* (7), 489–505, 504; Robaye, *L'Obligation*, 71–76; Fiori, *Locatio conductio*, 128–131.

120 Little is known about shipping contracts. Meyer-Temeer, *Die Haftung*, 171 speculates that contracts of this kind would either have been in writing or, where verbal, confirmed by witnesses. Rathbone, *Maritime Commerce*, 208 mentions a sealed shipping contract to which the Sulpicii archive alludes, but it has not been preserved. On this, see Jones, *Bankers*, 103 (TPSulp. 78). For a plausible reconstruction of common clauses in such contracts, see Jones, *Bankers*, 111–112.

121 In my view, this goes some way to explaining the much contested D.19.2.31 (Alfen.

Some information about maritime contracts can be deduced from the texts. Given the nature of the contract, it seems safe to assume that the customer had to reach an agreement with *exercitor* or the *magister navis* on the transportation of goods (type/size/location) or passengers (number/destination), the cost of the transport and the time-frame.[122] Legal texts highlight some of these elements:

> D.14.2.10 pr (Lab. 1 Pith. a Paulo Epit.)[123] Si vehenda mancipia conduxisti, pro eo mancipio, quod in nave mortuum est, vectura tibi non debetur. PAULUS: immo quaeritur, quid actum est, utrum ut pro his qui impositi an pro his qui deportati essent, merces daretur: quod si hoc apparere non potuerit, satis erit pro nauta, si probaverit impositum esse mancipium.
>
> If you contract for the carriage of slaves, freight need not be paid to you in respect of any slave who dies en route. PAUL: But this depends on the agreement, whether freight was payable for the slaves who were loaded or for those who were landed. If it is not clear what the agreement was, it will be enough for the captain to prove that a slave was put on board.
>
> [Watson translation]

This text is concerned with the interpretation of a provision in a *lex* concerning with the transport of slaves as cargo. According to the opinion of Labeo, the shipper bore the risk for those slaves which perished on the voyage to the extent that he did not get paid for them. The jurist Paul, on the other hand, indicates that this matter should be resolved by looking at the agreement in order to ascertain the intention of the parties.[124] Paul mentions two

5 Dig. a Paulo Epit.) regarding Saufeius' ship. On this text see Cardilli, *L'Obbligazione di 'praestare'*, 269–276. See also more recently Backhaus, R. "Die Gefahrtragung bei gemeinsamen Unternehmungen und ihre Modifikation durch Parteiabsprachen im klassischen römischen Recht" 2004 *ZSS* (rA) (121), 233–261 and Bello Rodriguez, S. "La responsabilidad del naviero en el transporte de mercancías según D.19.2.31" 2002 *RIDA* (49), 45–55. The most recent analysis by Forschner, B. "Das Schiff des Saufeius: Anmerkungen zu D.19.2.31" 2011 *FHI* (8 November), 1–24, is very insightful. As to the existence of the *actio oneris aversi*, over which there is much scepticism, see Zimmermann, *Obligations*, 402 note 101; Bessenyö, A. "Das Rätsel der *actio oneris aversi*. Eine Exegese von D. 19, 2, 31" in *Iura Antiqua—Iura Moderna: Festschrift für Ferenc Benedek zum 75. Geburtstag* (Budapest 2001), 23–55 and also De Marco, N. "L'actio oneris aversi—appunti su un equivoco riconstruttivo" 2003 *Labeo* (49), 140–159. See also De Marco, N. "L'*Aversio*: Una clausola dell'*emptio venditio* e della *locatio conductio*" 2000 *Index* (28), 355–378.

122 According to Rathbone, *Maritime Commerce*, 211 the value of cargoes often exceeded the value of ships.

123 On this text, see Thomas, 1960 *RIDA* (7), 489–505, 502; Cerami, *Diritto*, 259–260; Vacca, *Considerazioni*, 282–284 as well as Babusiaux, *Id quod actum est*, 230–232.

124 There is some debate whether this text is one of *locatio conductio rei* or perhaps a hybrid between *locatio conductio rei* and *operae*, see Cerami, *Diritto*, 259; Robaye, *L'Obligation*, 63–64.

potential arrangements in relation to payment, namely a) for those slaves who were loaded, or b) for those who survived the journey. In the absence of any clear agreement between the parties, Paul proposed that the shipper should not be held liable for the loss of those slaves who perished during the voyage (presumably through no fault of the carrier). The loss fell to the customer. This default rule appears to have been created to protect him from a lawsuit by the customer who failed to make adequate provision for this matter in the contract.[125] It cannot be ruled out that the nature of the cargo (perishable movables) may have influenced the decision in this case.[126]

The fact that Paul mentions payment options in relation to perishing of cargo suggests that this was a common convention used in Roman maritime transport contract. It is unclear from this text how payment worked in maritime contracts, but the reference to proof of the size of the cargo at the time of loading would suggest payment upon delivery (similar to *per aversionem* in construction). Take the following analogous example from the realm of *locatio conductio rei*:

> D.14.2.10.2 (Lab. 1 Pith. a Paulo Epit.) Si conduxisti navem amphorarum duo milium et ibi amphoras portasti, pro duobus milibus amphorarum pretium debes. Paulus: immo si aversione navis conducta est, pro duobus milibus debetur merces: si pro numero impositarum amphorarum merces constituta est, contra se habet: nam pro tot amphoris pretium debes, quot portasti.
>
> If you hire a ship capable of carrying two thousand jars and you load jars on it, you must pay freight for two thousand jars. PAUL: But the freight for two thousand jars will only be payable if the ship is hired at a flat rate. If the freight was fixed in relation to the number of jars loaded, the result is different, for you will only owe freight for the number of jars you put onboard.
>
> [Watson translation]

In light of this text, it is plausible that Paul's interpretation in D.14.2.10 pr refers to different modalities of renting a ship and of the different forms of payment associated with maritime shipping contracts.

Issues of payment also cropped up in relation to the transport of passengers:

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125 It must be assumed that the rule presented here is one that applied when no additional guarantee (*receptum*) had been entered into, see Meyer-Temeer, *Die Haftung*, 172, 197, 218; Thomas, 1960 *RIDA* (7), 489–505, 492. The *actio furti* or *actio damni adversus nautarum* would not be available here.

126 Since slaves did not count as jettisoned goods under the *Lex Rhodia de Iactu*, see Aubert, Aubert, J.-J. "Dealing with the Abyss: the Nature and Purpose of the Rhodian Sea Law on Jettison (*Lex Rhodia de Iactu*, D.14.2) and the making of Justinian's Digest" in *Beyond Dogmatics* (Edinburgh 2007), 158–172, 162. See Serrano-Vicente, *Custodiam praestare*, 317–335.

> D.19.2.19.7 (Ulpian. 32 ad Ed.) Si quis mulierem vehendam navi conduxisset, deinde in nave infans natus fuisset, probandum est pro infante nihil deberi, cum neque vectura eius magna sit neque his omnibus utatur, quae ad navigantium usum parantur.
>
> A shipmaster engages to carry a woman by ship, and in the course of the voyage the woman is delivered of a child; it is clear that nothing need be paid for the child, as carrying it is no great business, and the child makes no use of the appliances provided for the passengers. [Monro translation]

This text, is concerned with the interpretation of a provision in a *lex* concerning the issue of agreed payment. According to Ulpian, the passenger should not be charged more for the infant born *en route* since it would not be a drain on pre-prepared resources. This would suggest at least partial payment at the end of the voyage, but it is not possible to draw any general conclusions from this text.

Various other provisions could also form part of the contract as demonstrated by the following text:

> D.19.2.13.1 (Ulpian. 32 ad Ed.)[127] Si navicularius[128] onus Minturnas vehendum conduxerit et, cum flumen Minturnense navis ea subire non posset, in aliam navem merces transtulerit eaque navis in ostio fluminis perierit, tenetur primus navicularius? Labeo, si culpa caret, non teneri ait: ceterum si vel invito domino fecit vel quo non debuit tempore aut si minus idoneae navi, tunc ex locato agendum.
>
> A bargeman undertakes to carry a cargo to Minturnae, but his own barge not being able to get up the river, he transships the goods into another, and, this latter is lost at the mouth of the river: will the first man be liable? Labeo says, if he was guilty of no negligence, he is not liable; but if he transshipped against the wish of the owner of the goods, or at an improper time, or onto an unserviceable barge, then he is liable to an action founded on the contract. [Monro translation]

The crux of the text is whether the *exercitor* is contractually liable to customers for their loss following the foundering of the ship.[129] Liability will vest if the carrier can be shown to have had fault, either by acting against the will of the freight owner (presumably as recorded in the contract), or by showing

[127] On this text, see MacCormack, 1994 *Index* (22), 189–209, 200–201; Knütel, 1983 *ZSS* (rA) (100), 340–443, 415–419; Robaye, *L'Obligation*, 89–90.

[128] The term *navicularius* in this context could refer to the *exercitor* or the *magister navis*, but it most likely referred to the *exercitor*, see Jones, *Bankers*, 111.

[129] Knütel, 1983 *ZSS* (rA) (100), 340–443, 419 suggests that this text cannot be taken to mean that a general rule against transshipping existed in Roman law.

lack of skill (time of year) or lack of judgement (less suitable ship).[130] More than anything, this text demonstrates the situational nature of *culpa* in the minds of the Roman jurists. This is also evident from the following text:

> D.19.2.13.2 (Ulpian. 32 ad Ed.) Si magister navis sine gubernatore in flumen navem immiserit et tempestate orta temperare non potuerit et navem perdiderit, vectores habebunt adversus eum ex locato actionem.
>
> If the master of a ship takes his ship into the river without a pilot, and, a storm coming on, is unable to control the vessel and she is lost, the merchants will have a good action against him on the contract. [Monro translation]

This text illustrates the default notions of liability for shipping of cargo. Not providing adequate skilled staff to steer the ship is clearly *culpa* and entitles the passengers to a claim *ex locato*.

Modern understanding of contractual liability in relation to maritime shipping is further complicated by two factors. Apart from the texts which mention *culpa*, D.4.9.5 pr also mentions the concept of *custodia* as well which is hardly surprising given the fact that the shipper takes control of the goods of his customers for the duration of the voyage.[131] More problematic is the notion of the *receptum*. Legal sources show that it was possible to expand the conventional notions of contractual liability using a *receptum* provision (a *pactum adiectum* to the contract), which initially had to be explicitly entered into.[132] The *receptum* initially rendered the shipper liable for all loss even that caused by *vis maior*, but after the introduction of the *exceptio labeoniana* loss arising from the latter was excluded.[133] The relationship between the default notions of *dolus* and *culpa* in maritime shipping and the *receptum* remains disputed.[134] It has been suggested persuasively by Thomas that the *receptum* was specifically created because it was sometimes difficult to prove *dolus* or *culpa*.[135] This may also explain

130 Knütel, 1983 *ZSS* (rA) (100), 340–443, 416 classifies this as *culpa in eligendo*. Van den Bergh, 1975 *TvR* (43-1) 59–72, 69 states that the fault did not release the *exercitor* from his duty of care. In his view, the extent of the duty will be contextualised in terms of the provisions of the contract and his special skills (choice of time and vessel).

131 Thomas, 1960 *RIDA* (7), 489–505, 490; Robaye, *L'Obligation*, 92–93.

132 Robaye, *L'Obligation*, 89. See also Cerami, *Diritto*, 269–281.

133 See D.4.9.3.1 (Ulpian. 14 ad Ed.). It has been observed by Taubenschlag, R. *The Law of Greco-Roman Egypt in the Light of the Papyri: 332B.C. – 640 A.D.* 2nd revised and enlarged ed. (Warsaw 1955), 381–383 that something equivalent to the *receptum* existed in Graeco-Egyptian law.

134 See González Romanillos, J. "Observaciones sobre la responsabilidad en el *receptum nautarum*" 2004 *SCDR* (16), 277–286.

135 Thomas, 1960 *RIDA* (7), 489–505, 495. See also Zimmermann, *Obligations*, 517–518; Serrano-Vicente, *Custodiam praestare*, 317–335.

why it eventually came to be implied in all contracts of maritime charter. One final aspect to be considered is that of the *Lex Rhodia de Iactu*.[136] The provisions of this law, which have only a tenuous link with Rhodes, dictated that in cases of shipwreck where the shipper was forced to jettison some of the cargo to save the ship, he could, if sued by those customers who had lost their goods in the shipwreck, countersue with the *actio ex conducto*, the effect of which would be split the loss among those whose cargo survived the shipwreck.[137] Most recently, Aubert has persuasively argued that the *Lex Rhodia* is nothing more than a model *lex contractus* which was included in the Digest to demonstrate a standard charter contract for maritime shipping.[138] If this is indeed the case, which seems highly plausible, then all that this law really demonstrates is the common maritime convention in dealing with the consequences of *vis maior* and how the loss was assigned in this case. The owners of the cargo, as *locatores*, bore the loss.

3.3. *Carriage Where the Mode of Transport Cannot Be Determined*

In certain legal texts it is impossible to discern whether transport of goods or passengers occurred by land or water. Take the example of D.47.2.14.17 (Ulpian. 29 ad Sab.) which deals with the transport of a letter between sender and receiver. At first glance, the link with the contract of letting and hiring seems tenuous, but a closer reading reveals useful information. Benöhr has summarised the law relating to the delivery of letters as follows.[139] Ownership of a letter vested in the owner of the paper or the wax tablet on which it was written. Where a letter was handed to the slave of the addressee or his *procurator* and there was no intention to receive a response written on the same letter, ownership vested in the addressee immediately via his slave or *procurator*. Where the writer of the letter expected a response written on the same document or wax tablet, ownership of the letter did not pass. Where a letter was entrusted to a free person for delivery with the instruction to return the letter to the writer, this could either be done through a gratuitous *mandatum* or, if the courier received a fee, as a contract of letting and hiring. In this case, the letter writer (*locator*) let out

[136] Cardilli, *L'Obbligazione di 'praestare'*, 265–269; Zimmermann, *Obligations*, 406–408.
[137] See Chevreau, E. "La *lex Rhodia de iactu*: un example de la réception d'un institution étrangère dans le droit romain" 2005 *TvR* (73), 67–80.
[138] Aubert, *The Rhodian Sea Law*, 170.
[139] Benöhr, H.-P. "Der Brief—Korrespondenz, menschlich und rechtlich gesehen" 1998 *ZSS* (rA) (128), 115–149.

the completion of a task (delivery and return of letter or wax tablet) to the courier (*conductor*) in return for the payment of a fee. As the text shows, the person who was tasked with delivering the letter also had the *actio furti* to the extent of his interest in the letter not being stolen, a pattern also visible in the case of the fuller and tailor.[140]

Aside from the example of the letter, there are indications that some contracts for the transport of goods were more complex as is demonstrated by the following text:

> D.19.2.25.7 (Gaius 10 ad Ed. Prov.)[141] Qui columnam transportandam conduxit, si ea, dum tollitur aut portatur aut reponitur, fracta sit, ita id periculum praestat, si qua ipsius eorumque, quorum opera uteretur, culpa acciderit; culpa autem abest. Si omnia facta sunt, quae dilligentissimus quisque observaturus fuisset. Idem scilicet intellegemus et si dolia vel tignum transportandum aliquis conduxerit: idemque etiam ad ceteras res transferri potest.
>
> If a man has engaged for the carriage of a column, and in the course of removing, carrying or re-erecting it, the column gets broken, he is only answerable for the risk if the mischief occurs by some negligence of his own or of those whom he employed; and there is no negligence if all precautions were taken which any perfectly careful person would have observed. …
>
> [Monro translation]

This text is primarily concerned with the risk regime in a contract for the transport of a column, but the final sentence is probably meant to convey a general rule which applied to contracts for the transport of goods generally. It also demonstrates the development of the notion of vicarious liability for the actions of slaves and employees. According to Gaius, the *conductor* was liable *ex locato* if he or his employees were at fault. They are exempt from liability, however, if the loss occurs through accident. There can be no *culpa* if every precaution had been taken than a careful person would have done. Van den Bergh rejects those who strike out the phrase *diligentissimus* by noting that such transport is a highly specialist task, hence the use of the phrase. Since these are "default" rules, it is plausible that the parties may have made an alternative arrangement.[142]

Roman legal texts also mention other issues recorded in contracts for the transport of freight:

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140 Robaye, *L'Obligation*, 200–205.

141 For problems with the text, see MacCormack, 1972 *ZSS* (rA) (89), 149–219, 202 note 149. For a discussion of the text, see MacCormack, 1971 *RIDA* (18), 525–551, 541; Knütel, 1983 *ZSS* (rA) (100), 340–443, 419–423; Robaye, *L'Obligation*, 206–207.

142 For some scepticism as to whether this is meant to convey a general rule, see Knütel, 1983 *ZSS* (rA) (100), 340–443, 421.

D.19.2.11.3 (Ulpian. 32 ad Ed.)[143] Qui vinum de campania transportandum conduxisset, deinde mota a quodam controversia signatum suo et alterius sigillo in apothecam deposuisset, ex locato tenetur, ut locatori possessionem vini sine controversia reddat, nisi culpa conductor careret.

A man contracted to carry wine from Campania, and his title to the wine is being disputed by someone, he deposited it in a warehouse under the seal of himself and the other party to the dispute: his employer has still a good right of action against him on the contract for delivery of the wine into his possession free from dispute, unless the carrier was guilty of no negligence. [Monro translation]

As the final sentence stands, the *conductor*, if he is at fault, is liable to restore possession of the wine to the customer (*locator*).[144] If he is free from fault, then presumably he is not liable and it would be up to the parties disputing ownership to bring the *actio ad exhibendum* for the production of the wine.

4. Letting and Hiring of *Operae* Traditionally Classified As *Artes Liberales*

Conventionally, a certain group of "professions" have been excluded from the ambit of the contract.[145] The so-called *artes liberales*, represented professions which the Roman jurists regarded as too noble to be defiled with money using the contract of letting and hiring. The commercial aspects of such professions were explained with reference to the contract of mandate and associated tokens of gratitude (*honoraria*). The roots of the debate concerning the exclusion of *artes liberales* from the scope of *locatio conductio operarum* can be traced to the eighteenth century.[146] At the heart of it lies the assumption that the term *artes liberales* was a technical legal category which excluded certain professions from the scope of the contract.[147] The primary sources in this debate are a statement by the Republican statesman and lawyer Cicero (*De Officiis* 1.42.150) broadly echoed by the philosopher Seneca (*Epistulae Morales* 88.1–2) and the rhetorician Quintilian (*Institutiones Oratoriae* 12.11.20) as well as a text by the third-century jurist Paul (D.19.5.5.2). These texts need not be examined in detail as they have been

[143] MacCormack, 1994 *Index* (22), 189–209, 202; Robaye, *L'Obligation*, 207–208.
[144] Compare C.4.65.14 (a. 259) regarding the transport of wheat and barley.
[145] Mayer-Maly, 1967 *RdA* (8–9), 281–286, 284.
[146] Macqueron, J. "Réflexions sur *la locatio operarum* et le *mercennarius*" 1959 *RHDFE* (37), 600–616.
[147] For a valiant attempt to define this category, see Visky, K. "Esclavage et *artes liberales* à Rome" 1968 *RIDA* (15), 473–485.

subjected to intense scrutiny.[148] Cicero (*De Officiis* 1.42.150) states that manual *operae* are unworthy of a free person and are tantamount to slavery. He concedes that some *operae* could be performed in return for payment by free persons, but only by those of low standing. These include medicine, architecture, philosophy and (large scale) commerce. Roughly a century later, Seneca (*Epistulae Morales* 88.1–2) and sometime after him Quintilian (*Institutiones Oratoriae* 12.11.20) identified philosophy, the teaching of grammar and mathematics as liberal arts. In D.19.5.5.2, the jurist Paul indicated that some *operae* (without elaborating on this matter) are capable of being let out while others are not.

From these disparate comments, scholars of Roman law created the doctrine of *artes liberales* which excluded certain professions from the ambit of the contract. In its heyday, this doctrine was refined at great length using innovative arguments based on interpolation criticism. In essence, this doctrine was founded on an unshaken belief that the Roman aristocratic bias against commerce must have had an impact on legal development in this area.[149] More recently, however, the existence of this doctrine in Roman juristic thought has been questioned. It has been shown that the term *artes liberales* was not a technical legal one, but a philosophical (Stoic) construct which did not have any impact on the scope of *locatio conductio*.[150] Furthermore, as is clear from the foundational statements above, there is no legal evidence to suggest that the professions classified as *artes liberales* were excluded from the ambit of *locatio conductio*. Not only do scholars now believe that most of thesse professions were included within the scope of the contract, but it is also now generally accepted that Roman juristic attitudes towards certain professions did not remain static.[151] Coppola, in her comprehensive study of this topic, has shown that the distinction between *operae liberales* and *operae illiberales* should be abandoned as it is not borne out by the sources.[152] While originally a profession may have been regarded as not being *locabilis*, in time it was brought within the ambit of the contract.

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148 See Visky as cited above.

149 Visky, 1968 *RIDA* (15), 473–485, 473–477.

150 Thomas, 1961 *BIDR* (64), 231–247, 240–241; Molnár, 1982 *BIDR* (85), 127–142, 138–142; Stoop, *Werkers en Werk*, 224; Zimmermann, *Obligations*, 388 note 23; Nörr, D. "Zur sozialen und rechtlichen Bewertung der freien Arbeit in Rom" 1965 *ZSS* (rA) (82), 67–105, 69, 78–79; Fiori, *Locatio conductio*, 395 and Möller, *Freiheit*, 15–18.

151 Stoop, *Werkers en Werk*, 226; Gómez-Royo, E. and Buigues-Oliver, G. "Die Haftung der Ärzte in den klassischen und nachklassischen Quellen" 1990 *RIDA* (37), 167–196, 173.

152 Coppola, G. *Cultura e potere—il lavoro intellettuale nel mondo romano* (Milan 1994), 559.

As she has shown, the origin of this bias against paid work, originated in the earliest phase of Rome's history and was based on aristocratic domination of certain types of work. The legacy of this, combined with the influence of Hellenistic culture in the second century BCE, gave rise to a deeply conservative view of certain "intellectual professions" as expressions of power.[153] This view continued to dominate until the reign of Vespasian when a profound change in perception occurs in relation to the mercantile aspects of these professions.[154] In view of the uncertainties which now surround the category of *artes liberales*, it seems prudent to examine each of the professions traditionally grouped as *artes liberales* individually to assess whether the time has arrived to abandon this category for good.[155] This will be done below.

4.1. *Doctors*

Doctors are mentioned in a number of Roman legal texts, but there are surprisingly few references to doctors in the context of *locatio conductio*.[156] This lack of evidence is commonly explained with reference to the origins of the Roman medical profession which in the early Republic was practiced mostly by Greek slaves and freedmen.[157] But the profession clearly did not remain static. It is now generally accepted that Roman medical profession developed over time.[158] By the start of the classical period free persons had also begun to practice as doctors for a fee and the *operae* of doctors came to be asociated in the mind of the Roman jurists with the contract of letting and hiring.[159] The following text by Ulpian should be seen in this context:

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[153] Coppola, *Cultura e potere*, 560–561.

[154] Coppola, *Cultura e potere*, 561–564.

[155] Coppola, *Cultura e potere*, 559.

[156] Wacke, A. "Die Anerkennung der Medizin als *ars liberalis* und der Honoraranspruch des Artzes" 1996 *ZSS* (rA) (113), 382–421, 384; De Robertis, *I rapporti*, 193–194; Visky, 1968 *RIDA* (15), 473–485, 483; Visky, K. "La qualifica della medicina e dell'architettura nelle fonti del diritto romano" 1959 *IVRA* (10), 24–66, 31–32; Zimmermann, *Obligations*, 390, 393; Gomez-Royo and Buigues-Oliver, 1990 *RIDA* (37), 167–196, 177. An influential earlier work is that of Below, K.-H. *Der Arzt im römischen Recht* (Munich 1953).

[157] See Elliot, J.S. *Outlines of Greek and Roman Medicine* (Boston, MA 1914), 42; Visky, 1968 *RIDA* (15), 473–485, 483; Visky, 1959 *IVRA* (10), 24–66, 49 and Treggiari, *Freedmen*, 129–132; Gomez-Royo and Buigues-Oliver, 1990 *RIDA* (37), 167–196, 177. See comprehensively, Coppola, *Cultura e potere*, 103.

[158] Thomas, 1961 *BIDR* (64), 231–247, 241–243.

[159] Coppola, *Cultura e potere*, 111–112 shows that the bias against the payment of doctors for *operae* may be traced to Cicero.

D.9.2.7.8 (Ulpian. 18 ad Ed.)[160] Proculus ait, si medicus servum imperite secuerit, vel ex locato vel ex lege Aquilia competere actionem.

Proculus says that if a doctor operates negligently on a slave, an action will lie either on the contract of services or under the lex Aquilia.
[Watson translation]

This text contains a comment by Proculus as recounted by Ulpian. Given its brevity, it is impossible to determine the status of the parties, but the fact that the customer (the owner of the slave) was able to sue the doctor *ex locato* is significant. One may therefore assume that in this case the doctor must have been a free person otherwise there would have been a reference to the liability of the owner of the (slave) doctor based either on the *actio institoria* or the *actio de peculio*.[161]

For all the clarity of D.9.2.7.8, other texts are more ambigious:

D.19.5.27 (Pompon. 21 ad Sab.)[162] Quod Kalendis [Ianuariis?] dari solet medicis et scaenicis [aedificibus?], non est merces: itaque si quid in hisce ministeriis aliter fiat quam convenit, non ex locato, sed in factum actio dabitur.

The amount which is conventionally given to doctors and actors on the first of January should not be regarded as *merces*. Consequently if, in this type of agreement some other than what has been agreed has been done, an action *ex locato* will not be given, but rather one *in factum*. [Watson translation]

This text by Pomponius states that payment given to doctors (and actors) at the start of the year should not be classified as *merces*. This has been used by supporters of the *artes liberales* doctrine to argue that the *operae* of doctors could not be rented, since there could be no letting and hiring without *merces*. While such an interpretation is plausible, there is insufficient contextual information to substantiate such an interpretation. It seems much more likely, following Thomas and Wacke, to argue that the payment mentioned in this text does not refer to a normal contractual payment for *operae*

[160] Traditionally, it has been viewed as important for the evolution of the concept of *imperitia* (a form of *culpa* which arose during the mid-second century CE in relation to professional services), see Martin, 2001 *AJPH* (122), 107–129, 113. On the text see also Visky, 1959 *IVRA* (10), 24–60, 39–40.

[161] Nunez Paz, I. "Status del medico y responsabilidad civil" 2000 *RIDA* (47), 397–402, 401; Gomez-Royo and Buigues-Oliver, 1990 *RIDA* (37), 167–196, 187; Coppola, *Cultura e potere*, 168 and generally 159–172.

[162] Wacke, 1996 *ZSS* (rA) (113), 382–421, 410. There are a number of problems with this text. Doubts have been raised over its authenticity and it is therefore excluded from certain editions of the Digest (though it does appear in the standard edition by Mommsen). Coppola, *Cultura e potere*, 159.

rendered, but rather to a special *largesse* given to doctors and actors affiliated to the state.[163] State-affiliated doctors (*archiatri*) are first mentioned during the reign of the Emperor Nero.[164] From the second century CE, most Roman cities appear to have employed municipal doctors paid by the state (as well as by individuals) and by the time of the Emperor Constantine the existence of state-affiliated doctors paid by the state were widespread.[165] These state "employees" sometimes received *ad hoc* payments from the *fiscus*. When D.19.5.27 is viewed against this background, it merely shows that doctors and actors in state employment had an *actio in factum* to enforce payment of this *largesse* which stood apart from the payment (*merces*) which they received in return for their *operae*. Thus, it cannot be used to draw any conclusions about whether the *operae* of doctors could be rented out.

One further text on a similar theme raises the issue of the payment of doctors:

> D.50.13.1.1 (Ulpian. 8 Omn. Trib.) Medicorum quoque eadem causa est quae professorum, nisi quod iustior, cum hi salutis hominum, illi studiorum curam agant: et ideo his quoque extra ordinem ius dici debet.
>
> The claim of doctors is the same as that of teachers, perhaps even better, since they take care of men's health, teachers of their pursuits. And as a result in their case also judicial hearings must take place outside the regular system.
>
> [Watson translation]

Thomas, relying on evidence of the emergence of a state medical service during the Principate, has argued that this text referred to such a case.[166] If this is correct, it confirms little more than what has already been established above. It is also worth pointing out that this text appears immediately below another statement by Ulpian (D.50.13.1 pr) where it is said that the Governor of a province ought to set the salaries of doctors and teachers.[167] When read in context, the reference to *extra ordinem* is nothing more than a reference to the procedure used by the court of the Governor.

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163 Wacke, 1996 *ZSS* (rA) (113), 382–421, 410–411; Thomas, 1961 *BIDR* (64), 231–247, 242.

164 Elliot, *Outlines*, 49.

165 Cilliers, L. "Where Were the Doctors when the Roman Empire Died?" 2005 *Acta Theologica* (Supplementum 7), 62–78, 65; Coppola, *Cultura e potere*, 371–373.

166 Thomas, 1961 *BIDR* (64), 231–247, 242; Gomez-Royo and Buigues-Oliver, 1990 *RIDA* (37), 167–196, 187–188.

167 For a discussion of the fees of doctors, see Elliot, *Outlines*, 110.

4.2. *Land-Surveyors and Architects*

There are two conflicting texts relating to land-surveyors and the contract of letting and hiring.

> D.11.6.1 pr (Ulpian. 24 ad Ed.) Adversus mensorem agrorum praetor in factum actionem composuit. A quo falli nos non oportet: nam interest nostra, ne fallamur in modi renuntiatione, si forte vel de finibus contentio sit vel emptor scire velit vel venditor, cuius modi ager veneat. Ideo autem hanc actionem proposuit, quia non crediderunt veteres inter talem personam locationem et conductionem esse, sed magis operam beneficii loco praeberi et id quod datur ei ad remunerandum dari et inde honorarium appellari: si autem ex locato conducto fuerit actum, dicendum erit nec tenere intentionem.
>
> The praetor has provided an *actio in factum* against land surveyors. We ought not to be deceived by them, because it is important for us not to be misled when we receive a report about the area of a piece of land, for instance, if we are involved in a boundary dispute or if a buyer or seller wants to know what area of land is being sold. The reason why the praetor has provided this action is that the early lawyers held that when one engages someone like a surveyor, one does not hire him, but rather he provides his services as a favor, and the payment he receives is by way of remuneration; hence it is called a honorarium. Moreover, if an action on hire is raised, one must rule that it does not hold good. [Watson translation]

> D.10.1.4.1 (Paul. 23 ad Ed.) In iudicio finium regundorum etiam eius ratio fit quod interest. Quid enim si quis aliquam utilitatem ex eo loco percepit, quem vicini esse appareat? Non inique damnatio eo nomine fiet. Sed et si mensor ab altero solo conductus sit, condemnatio erit facienda eius, qui non conduxit, in partem mercedis.
>
> In the action for regulating boundaries, one also takes account of any advantage. For what if someone has derived some benefit from a piece of land which, as it turns out, belongs to his neighbor? It is not unfair for him to be condemned on that account. Also, if a surveyor has been hired by one party only, the other, who did not hire him, should be condemned to pay part of the fee. [Watson translation]

These texts contain the seemingly conflicting opinions of two jurists.[168] Ulpian, relying on the view of the *veteres* (unnamed Republican jurists), argues that it is impossible for the *operae* of a surveyor to be rented,[169] while Paul casually mentiones that it is possible. Since these are the only two

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[168] De Robertis, *I rapporti*, 186–189, 194–196.

[169] Although in D.11.6.1.1 towards the end he admits that it is common practice for the *operae* of land-surveyors to be rented and that this is known to Praetors.

texts in which land-surveying is mentioned in connection with letting and hiring, it is difficult to justify the differing opinions.[170] Thomas has suggested that these two texts shed light on different stages within evolution of this profession.[171] In the earliest stage, land-surveying was closely associated with divining and augury and therefore fell outside the scope of *locatio conductio*.[172] By the Empire, this association had vanished and it became possible to pay surveyors whose *operae* had been rented.[173]

Little can be said about the position of architects. Given that they are mentioned in the texts on which the doctrine of *artes liberales* is based, it has been suggested that architecture was a profession and could not be the subject of the contract of letting and hiring.[174] This view has since been comprehensively refuted by Coppola in her study of the origins of this profession.[175]

4.3. *Advocates*

A number of Roman legal texts mention the payment of advocates.[176] Though these mention the contract of letting and hiring only incidentally, this has not prevented the matter from being incorporated into the debate about *artes liberales*.[177] The payment of advocates and the "commercial" relationship between an advocate and client is the subject of much academic debate.[178] Thomas has argued that the evolution of the profession of the advocate follows the same general pattern visible in the other "professions" traditionally contained in the category of liberal arts.[179] Thus, in early Roman law, advocates, as a rule, would have been patricians who did not require payment for *operae* rendered in court. Bablitz, echoing Thomas,

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[170] Visky, 1968 *RIDA* (15), 473–485, 481.

[171] Thomas, 1961 *BIDR* (64), 231–247.

[172] Compare Visky, 1968 *RIDA* (15), 473–485, 483; Coppola, *Cultura e potere*, 112.

[173] On the use of *agrimensores* in court cases, see Maganzani, L. "Land Surveying for Legal Disputes: Technical Advice in Roman Law" in *Sfruttamento, tutela e valorizzazione del territorio* (Naples 2007), 1–14.

[174] Visky, 1959 *IVRA* (10), 24–66, 52, 53, 59–62. See also Martin, *Private Building*, 49–52; Treggiari, *Freedmen*, 132–135.

[175] Coppola, *Cultura e potere*, 113–115. For an earlier account, see Crook, J.A. *Legal Advocacy in the Roman World* (London 1995), 129–131.

[176] D.19.2.38.1 (Paul. 1 Reg.) Advocati quoque, si per eos non steterit quo minus causam agant, honoraria reddere non debent. See also C.2.6.4 (a. 240); C.2.6.5 (a. 325); C.3.1.13.9 (a. 530); C.3.1.15 (a. 531); C.4.6.11 (a. 294).

[177] See Visky, 1968 *RIDA* (15), 473–485, 480.

[178] See, for example, Coppola, *Cultura e potere*, 195–202.

[179] Thomas, 1961 *BIDR* (64), 231–247, 245.

has demonstrated that in the early Republic, most advocates would have been patrons who acted in court mainly on behalf of their clients.[180] Since these clients did not pay their patron in money, but in *operae* owed in terms of the oath of the freedman, the "commercial" relationship between advocate and client would not have been viewed as one which could be included within the ambit of the contract.

By the late Republic, men from humbler background had begun to practice as advocates (Cicero being a prime example) and this had given rise to the "monetisation" of advocacy.[181] Given its august origins, however, Roman philosophers continued to insist that the *operae* of an advocate could not be "rented" and that the payment which they received was merely a token of gratitude (*honorarium*).[182] Considerable variation occurred in practice and some practitioners disregarded the accepted legal position. Bablitz has shown that by the end of the Republic, remuneration of advocates had become so common that legislation (The *Leges Iuliae Iudiciariae* of 17 BCE) had to be enacted to reinforce state policy that advocates had to provide their *operae* for free. Any contravention of this law was punishable with a quadruple fine. Much uncertainty about the legal position prevailed during the first-century CE.[183] Pliny, *Ep.* 5.9 indicates that it was legally forbidden to promise or pay a *honorarium* before the start of a lawsuit.[184] This, according to Thomas, would have ruled out any possibility of a *locatio conductio* between advocate and client.[185] By the mid-first century CE, the Roman state had conceded that payment of advocates occurred and tried to regulate the matter.[186] The Emperor Claudius introduced maximum tariffs of 100 *aurei* as an *honorarium* and stipulated that the amount could only be agreed on and handed over at the end of the legal proceedings.[187]

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180 Bablitz, L. *Actors and Audience in the Roman Courtroom* (London 2007), 141–143. In her view, this is also visible in the terminology used to describe the advocate, the earliest of which is *patronus*, followed later by *advocatus* and by the first century CE by *causidicus*, see 148.

181 Bablitz, *Actors and Audience*, 145, 148.

182 For ways in which this prohibition could be evaded, see Coppola, *Cultura e potere*, 195–210.

183 Bablitz, *Actors and Audience*, 148 argues that the professionalisation of advocacy which occurred during the first and second centuries CE also led to a decline in the standards.

184 [4] Suberat edicto senatus consultum: hoc omnes qui quid negotii haberent iurare prius quam agerent iubebantur, nihil se ob advocationem cuiquam dedisse promisisse cavisse. His enim verbis ac mille praeterea et venire advocationes et emi vetabantur; peractis tamen negotiis permittebatur pecuniam dumtaxat decem milium dare.

185 Thomas, 1961 *BIDR* (64), 231–247, 246.

186 For the position of state advocates, see Coppola, *Cultura e potere*, 374.

187 Tacitus, *Ann.*11.5–7.

4.4. *School Teachers, Teachers of Civil Law and Philosophers*

There are no legal texts (apart from the cursory reference in D.50.13.1.1 (Ulpian. 8 Omn. Trib.))[188] in which school teachers are mentioned in the context of the contract of letting and hiring. Roman writers of the period under discussion demonstrate, however, that renting of *operae* of a teacher occurred.[189] Pliny, *Ep.* 4.13.3–10 discusses the case where he encouraged the citizens of his home town to establish a salary fund in order to hire a teacher for their children. This letter discusses the creation of a privately-endowed school where parents contributed to the salary fund and had the final say in renting the *operae* of a teacher. Both Martial, *Ep.*9.68 and Juvenal, *Sat.*7.215–243 indicate that *operae* of teachers could be rented, but apart from that they provide little information concerning the terms of such an agreement or any other details about the contract.[190] At most, it may be pointed out that Juvenal's comment suggests that the teacher was paid at the end of a twelve month period (*per aversionem*?). That this was not universally practiced is evidenced by Diocletian's price edict of 301 CE where the monthly wage per schoolboy of a teacher (of various different topics) is listed. At best it may be speculated that the regime mentioned in Juvenal may have resembled that of the apprentice.

As in the previous case, there are no Roman legal texts which mention teachers of civil law and philosophers in connection with the contract of letting and hiring.[191] Traditionally, one text has been used to demonstrate that these two professions could not be practiced in return for the payment of money:

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[188] Medicorum quoque eadem causa est quae professorum, nisi quod iustior, cum hi salutis hominum, illi studiorum curam agant: et ideo his quoque extra ordinem ius dici debet.

The claim of doctors is the same as that of teachers, perhaps even better, since they take care of men's health, teachers of their pursuits. And as a result in their case also judicial hearings must take place outside the regular system. [Watson translation].

[189] Teaching in return for financial remuneration most likely arose in the third century BCE, see Coppola, *Cultura e potere*, 73, 78 o 79.

[190] See also the reference to Suetonius in Treggiari, *Freedmen*, 113. Coppola, *Cultura e potere*, 173–177. As with most other "professions", it also came under state control during the course of the Empire, see Coppola, *Cultura e potere*, 309, 313–314, 371–373.

[191] The study of rhetoric and philosophy arose after teaching, see Coppola, *Cutura e potere*, 97–80.

> D.50.13.1.4–5 (Ulpian. 8 Omn. Trib.)[192] An et philosophi professorum numero sint? Et non putem, non quia non religiosa res est, sed quia hoc primum profiteri eos oportet mercennariam operam spernere. [5] Proinde ne iuris quidem civilis professoribus ius dicent: est quidem res sanctissima civilis sapientia, sed quae pretio nummario non sit aestimanda nec dehonestanda, dum in iudicio honor petitur, qui in ingressu sacramenti offerri debuit. Quaedam enim tametsi honeste accipiantur, inhoneste tamen petuntur.
>
> [4] But are philosophers also to be included among teachers? I should not think so, not because the subject is not hallowed, but because they ought above all to claim to spurn mercenary activity. [5] Likewise, governors should not hear cases involving teachers of civil law; knowledge of civil law is indeed most hallowed thing, but something which is not to be valued in terms of money or dishonored by seeking in court a fee which should have been offered voluntarily when someone began to follow such a calling.
>
> [Watson translation]

This text does not contribute much to the debate. At best it shows that philosophers and teachers of civil law could not have their claims for wages settled by an extraordinary judicial examination by the court of the governor.[193] Whether this should necessarily be taken to mean that the *operae* of philosopher or teacher of civil law could not be rented for money seems unconvincing.

5. Letting and Hiring of Other *Operae* Often Tainted with Social Opprobrium

Source material on this category is scarce. It is possible to identify specific instances, such as scribing in D.19.2.19.9 (Ulpian. 32 ad Ed.) and acting in D.48.5.11.2 (Pap. 2 Adult.), but on the whole these do not feature prominently in Roman juristic discussion on letting and hiring. The trades mentioned in Diocletian's Price Edict of 301 CE also provide some information, but it cannot be assumed that all of these were remunerated using the contract of letting and hiring. The following survey will distinguish two categories, namely those mentioned specifically and generic examples which cannot be circumscribed further. In all cases the emphasis seems to have been on the activity rather than the outcome.

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192 De Robertis, *I rapporti*, 193.
193 Compare Visky, 1968 *RIDA* (15), 473–485, 478.

5.1. *Named* Operae

5.1.1. *Scribing*

> D.19.2.19.9 (Ulpian. 32 ad Ed.) Cum quidam exceptor operas suas locasset, deinde is qui eas conduxerat decessisset, imperator Antoninus cum divo Severo rescripsit ad libellum exceptoris in haec verba: 'Cum per te non stetisse proponas, quo minus locatas operas Antonio Aquilae solveres, si eodem anno mercedes ab alio non accepisti, fidem contractus impleri aequum est.'
>
> An amanuensis having engaged to serve in that capacity, the person with whom he made the engagement died; and on applying to the emperor the main received an answer in these words: "It being part of your case that it was through no fault of yours that you did not fulfil your engagement with Antonius Aquila, if you did not accept wages from anyone else all that year, the contract ought in justice to be faithfully carried out."
>
> [Monro translation]

This is the only Roman legal text where a scribe is mentioned in connection with the contract of letting and hiring.[194] The fact that the scribe used the system of Imperial petitions (*a libellis*) suggests that he was a free person who could pursue payment through the courts.[195] Nothing more is known about the petitioner or the name Antonius Aquila. The text does not provide much information about the nature of the agreement other than the fact that it was classified by Ulpian as *locatio conductio*. With that said, certain observations may be ventured. First, given the fact that the scribe had to petition the Emperor for legal relief, it seems plausible that the parties had probably not included a provision dealing with this eventuality in their *lex*. The scribe was seeking payment, possibly following resistance from the heirs to his request for payment.[196] Secondly, one may speculate that the existing law on this point may have been unclear, thus necessitating an appeal to the Emperor. In third place, it should not be assumed that the gist of the Imperial rescript is meant to convey a general rule, especially in light of the caveat mentioned "unless you have received money from another source".[197] Had the Emperor wished to make a blanket rule, such a caveat would have been unnecessary. This caveat may in fact be far more important that first assumed. Fiori has

[194] For an overview of the work of scribes in Roman society, see Winsbury, R. *The Roman book* (London 2009), 57–66, 79–85. Compare D.19.2.19.10 (Ulpian. 32 ad Ed.) In this text Papinian echoes the Imperial decision. See also D.19.2.38 pr (Paul. 1 Reg.).

[195] Möller, *Freiheit*, 52.

[196] On the hereditability of the contract of letting and hiring, see Du Plessis, P.J. "The hereditability of *locatio conductio*" in *Beyond Dogmatics: Law and Society in the Roman World* (Edinburgh 2007), 139–156. See also Möller, *Freiheit*, 54, 56–58 for a survey of earlier literature.

[197] A view shared by Möller, *Freiheit*, 53.

demonstrated that Roman conceptual thought on letting and hiring in the late Republic laid down the fundamental notion that proportionality had to exist between performance and counterperformance. When viewed from this angle, the Imperial response is in keeping with earlier Roman conceptual thought on the contract. Finally, it is worth pointing out once more that the interpretation of the *fides contractus* given here is compatible with the Roman approach to the interpretation of the *lex* discussed in chapter one and the general concept of *bona fides* prevalent in the contract of letting and hiring.

5.1.2. *Acting*

Two legal texts mention actors in connection with letting and hiring in Roman law:

> D.3.2.3 (Gaius 1 ad Ed. Prov.) Qui autem operas suas locavit, ut prodiret artis ludicrae causa neque prodit, non notatur: quia non est ea res adeo turpis, ut etiam consilium puniri debeat.
>
> One who has hired himself out to appear on the stage and does not do so is not blacklisted, because this activity is not so disgraceful that even the intention requires punishment. [Watson translation]

> D.48.5.11.2 (Papin. 2 Adult.) Mulier, quae evitandae poenae adulterii gratia lenocinium fecerit aut operas suas in scaenam locavit, adulterii accusari damnarique ex senatus consulto potest.
>
> A woman who to avoid the penalty of adultery has become a brothel-keeper or who has hired herself out on the stage can be accused of an condemned for adultery according to the *senatus consultum.* [Watson translation]

It cannot be denied that many actors were slaves, but these texts also show that male and female actors of free status could rent out their *operae* as actors.[198] For much of the period under discussion, a social bias against this profession existed in Roman society.[199] Actresses were singled out for scorn.[200] This bias is visible in legal sources such as the *Lex Iulia de Adulteriis* of 18 BCE which expressly allowed a husband who caught his wife in the act

[198] Treggiari, *Freedmen*, 138–139. See also Brown, P. "Actors and Actor-Managers at Rome" in *Greek and Roman Actors—Aspects of an Ancient Profession* (Cambridge 2002) 225–237, 231. For the renting out of troupes of slave actors, see Brown, *Actors*, 235.

[199] See Ewigleben, C. "'What These Women Love is the Sword'—the Performers and their Audience" in *Gladiators and Caesars* (London 2000), 125–139.

[200] Ewigleben, *Performers*, 138 and Knapp, *Invisible Romans*, 253 who discusses the connection between theatre and prostitution. See also generally McGinn, T. *Prostitution, Sexuality and the Law in Ancient Rome* (New York 1998).

of adultery in the marital home with, among others, an actor, to put the latter to death with justification. A similar attitude towards actors is visible in the texts cited. The logical consequence of Gaius' comment in D.3.2.3 is that if a person were to go ahead with appearing on stage they would be censured and would therefore lose certain civic rights. Papinian's comment shows the same attitude. Women could not evade the legal penalties imposed by Augustus to punish adultery by downgrading their status to that of a brothel-keeper or actress. It has already been shown in relation to D.19.5.27 above that certain actors were state-employees and received payments from the *fiscus*. The rise of associations of state-actors occurred during the later part of the period under discussion and this text should be viewed in this context.[201] As this brief discussion has shown, although socially unacceptable, it cannot be taken to mean that this profession could not fall within the scope of the contract of letting and hiring.

5.1.3. *Gladiatorial Combat*

Roman legal sources show that both slaves and free persons could be gladiators although it is commonly assumed that most gladiators were convicted criminals or slaves.[202] Where slaves were let out as gladiators (presumably by a *lanista* who could be the owner or an agent of the owner or even a venture capitalist), legal sources are less than clear about the nature of the agreement.[203] The following text is an example:

> Inst.Gai.3.146 Item si gladiatores ea lege tibi tradiderim, ut in singulos, qui integri exierint, pro sudore denarii XX mihi darentur, in eos vero singulos, qui occisi aut debilitati fuerint, denarii mille, quaeritur, utrum emptio et venditio an locatio et conductio contrahatur. Et magis placuit eorum, qui integri exierint, locationem et conductionem contractam videri, at eorum, qui occisi aut debilitati sunt, emptionem et venditionem esse; idque ex accidentibus apparet, tamquam sub condicione facta cuiusque venditione aut locatione.
>
> Again, suppose I deliver gladiators to you on the express terms that I will get 20 for the efforts of each one who comes off unharmed but 1000 for each one killed or maimed, is this sale or hire? The received opinion is that there is hire

[201] See Webb, R. "Female Performers in Late Antiquity" in *Greek and Roman Actors: Aspects of a Profession* (Cambridge 2002), 292–303, 294, 295–296; Jory, E.J. "Associations of Actors in Rome" 1970 *Hermes* (98-2), 224–253, 244, 247.

[202] Treggiari, *Freedmen*, 141. For a thorough survey, see Futrell, A. *The Roman Games* (London 2006), 120–159. For a discussion of female gladiators, See Futrell, *Games*, 153–155.

[203] For an overview of literary sources, see Futrell, *Games*, 125–129. See also Junkelmann, M. "*Familia Gladiatoria*: the Heroes of the Amphitheatre" in *Gladiators and Caesars* (London 2000), 31–74 for a discussion.

> of the one who come off unharmed but sale of those killed or maimed, and events determine the classification, as if there were a conditional sale or hire of each one. For there is no longer any doubt that things can be sold or hired subject to conditions. [Gordon Robinson translation]

This difficult text shows that parties could enter an agreement which defies conventional classification.[204] In all likelihood, this was an agreement between a *lanista* and a local magistrate.[205] The agreement could be partly one of sale and partly one of letting and hiring subject to a suspensive condition of fulfilment.[206] The precise nature of the transaction in this case and the seeming "duality" has been the subject of intense scholarly controversy with a whole spectrum of opinions ranging from an outright sale to a formless transaction which, depending on the outcome, could transform either into a sale or a *locatio conductio*.[207] Thomas suggested that this twofold classification must have been established before the time of Gaius in the mid-second century CE.[208] It is noteworthy that this scenario is not dissimilar to the one already addressed in the discussion of goldsmiths who used their own gold to manufacture rings for the customer. In that case Sabinus proposed that it was a sale of the material and a letting and hiring of the skill of the goldsmith. A related idea is at work here. It seems likely, as Behrends has suggested, that this text should be viewed in the context of changing juristic attitudes towards the distinction between sale and *locatio conductio* which had dominated the late Republican period.[209]

One aspect of this text which has hitherto remained unexplored is the possibility that Gaius may be alluding to actual practice. Junkelmann has demonstrated that a *lanista*, as a venture capitalist, kept a careful record of the performance of each gladiator (wins, losses and draws).[210] This means

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[204] Robaye, *L'Obligation*, 167–168; Lázaro Guillamón, C. "Las transacciones commerciales a través de leasing en las fuentes jurídicas Romanas" 2001 *RIDA* (48), 185–211, 189 note 12 for an extensive literature survey on this text.

[205] See Behrends, O. "Feste Regelungsstruktur oder auslegungsfähiges Pflichtenverhältnis" in *Pacte, Convention, Contrat: Mélanges Bruno Schmidlin* (Basel 1998), 31–79, 37. See also Junkelmann, *Familia Gladiatoria*, 64.

[206] Thomas, J.A.C. "Gaius and the Gladiators" 1967 *Themis* (21), 151–156, following Guarino, sees this as a sensible and practical solution to the problem. For a survey of the academic debate on this matter, see Thomas, 1967 *Themis* (21), 151–156, 152–155. See also Prichard, A.M. "Sale and Hire" in *Studies in the Roman Law of Sale in Memory of Francis de Zulueta* (Oxford 1959), 1–8 and Lázaro Guillamón 2001 *RIDA* (48), 185–211, 190–191.

[207] Lázaro Guillamón 2001 *RIDA* (48), 185–211, 191–192; Behrends, *Regelungsstruktur*, 38.

[208] Thomas, 1967 *Themis* (21), 151–156, 155–156.

[209] Behrends, *Regelungsstruktur*, 37–51.

[210] Junkelmann, *Familia Gladiatoria*, 33.

that he would have had a good indication at the outset of tournament how large his losses might be. Such a prediction would be based not only on the performance to date of his own troupe of gladiators, but also on the information displayed publicly before the start of the tournament, the *libellus munerarius*, which listed the gladiators (also from the opposing side) that were to fight in the tournament and their "track record".[211] It seems plausible that this information lies behind Gaius' example. In light of this information it might be that the type of agreement to which Gaius is referring in this text reflects commercial reality. It has to be remembered that the *lanista* had no control over the outcome of the spectacle. If, in order to please the crowd, the host of the games (*editor*) decided not to spare the lives of certain vanquished fighters, such an eventuality had to be catered for in the contract. Where an *editor* ordered the killing of a defeated gladiator without being entitled to do so by the contract, he committed breach of contract and was subjected to severe penalties.[212] With that said, this text by Gaius does not clarify the nature of the contract between slave owner and the other party (presumably the organiser of a spectacle). If slaves were merely rented out as objects, it would be *locatio conductio rei*, but if the organiser of a spectacle let out the performance of a task (putting on a show of gladiators) in return for money it would be *locatio conductio* of *operae*.[213] In all likelihood, the specifics of the agreement would have dictated the kind of letting and hiring.

Less information is known about the practice of free persons letting out their *operae* as gladiators.[214] Roman legal texts show that the practice of free persons renting out their *operae* as gladiators occurred, but was frowned upon and attracted loss of status.[215] Take the following three texts. In D.3.1.1.6

211 Junkelmann, *Familia Gladiatoria*, 64, Dunkle, R. *Gladiators—Violence and Spectacle in Ancient Rome* (Harlow 2008), 45.

212 Dunkle, *Gladiators*, 39.

213 For cases where gladiators were rented out, see Knapp, *Invisible Romans*, 266.

214 As for the possible range of motives for enrolling as a gladiator, see Dunkle, *Gladiators*, 36–37.

215 For the impact of *infamia* on the status of the gladiator, see Futrell, *Games*, 130–132. See extensively, Moreau, Ph. "A propos du sénatus-consulte épigraphique de larinum" 1983 *REL* (61), 36–48 which discusses a *senatusconsultum* of 19 BCE which prevented senators, equestrians and their families from entering gladiatorial contests or acting as *lanistae*. Transgressions were punished with *infamia*. For the civil consequences of *infamia*, see Greenidge, A. *Infamia: its Place in Roman Public and Private Law* (Oxford 1894), 155–165. Wiedemann, T. *Emperors and Gladiators* (London 1992), 102 argues that the reason why upper-class Romans disliked free gladiators was because it subverted the "natural order" based on status. See also Dunkle, *Gladiators*, 35–36.

(Ulpian. 6 ad Ed.) Ulpian pondered whether a free person who has rented out his *operae* to fight wild beast should be censured, while in D.38.17.1.6 (Ulpian. 12 ad Sab.) he ruled that a person who had engaged in activities of this kind could not be admitted to their mother's estate by virtue of the *Senatusconsultum Orphitianum*. This enactment of 178 CE gave children a claim to the inheritance of their mother under Praetorian law. A similar limitation may be seen in D.38.1.37 pr (Paul. 2 Leg. Iul. Pap.) which excluded a freedman who had engaged in such activities from the privilege of not having to undertake duties on behalf of their patron once they have fathered two or more male or female childen.

None of these texts discuss the contractual arrangements between free gladiator and *lanista* in any great detail. Dunkle describes the procedure.[216] A free person wishing to enrol as a gladiator first had to make his intentions known to the Tribune of the Plebs, the official in charge with the protection of citizens. If the Tribune approved, the person was then at liberty to enter into a training contract with a *lanista*. Such a contract involved the swearing of an oath (*auctorare*) whereby a free person consented to place themselves under contract with a *lanista*.[217] They received a "sign-up fee" and in return were offered the opportunity to be trained and to make money.[218] A text from Seneca, *Ep*. 38.1–2, has traditionally been cited in this regard as containing the wording of the oath "uri, vinciri ferroque necari". This phrase is also mentioned by Seneca in *Ep*. 71.23 and occurs in Petronius, *Sat*. 117. The effect of this oath has been the subject of some controversy. It has been suggested by Futrell that the existence of this oath implies that free persons wishing to become gladiators had to swear an oath to the *lanista* which essentially deprived them of their liberty for the duration of the agreement and rendered these gladiators akin to slaves.[219] This assertion is difficult to justify, especially since it cannot really be inferred from this text what the legal effect of the oath mentioned here was. It simply cannot be inferred from the evidence that the effect of the oath was to deprive the gladiator of his liberty. In all likelihood, as Knapp has pointed out, the effect of the oath, like the one used when free persons enrolled for military service, was merely

216 Dunkle, *Gladiators*, 37.

217 On *auctorare*, see the extensive literature survey in Lázaro Guillamón 2001 *RIDA* (48), 185–211, 188 note 10. See also, Moreau, 1983 *REL* (61), 36–48, 41.

218 Dunkle, *Gladiators*, 37 surmises that training contracts of this kind included provisons on the amount of the "sign-up fee", the length of service, the number of bouts and the cost of "buy-out".

219 Futrell, *Games*, 132–133.

that a free Roman citizen consented to engaging in a potentially hazardous affair which could bring about death.[220] The contract was concluded with an initiation ritual.[221]

Like other professions, there is evidence that the profession of (free) gladiator came under state control during the course of the Empire.[222] An inscription recording a *senatus consultum* of 177 CE during the reign of Marcus Aurelius is concerned with the registration of free gladiators with a view to limiting their price.[223]

5.1.4. *Mining*

There are no Roman legal texts in which mining is discussed in connection with the contract of letting and hiring, but an epigraphic source, discovered between the eigteenth and nineteenth centuries, provides interesting insight into this aspect of the contract. Mines, as a rule, belonged to the state and were rented by entrepreneurs who exploited them for profit using a combination of free workers and slaves.[224] Three epigraphic inscriptions from the mid-second century CE (164 CE) from the Roman province of Dacia recount the *leges* agreed between a free mine worker and his employer. All three cover similar ground, but since two are largely fragmentary, only the most complete one will be reproduced and discussed here.[225]

> Macrino et Celso cos. XIII Kal(endas) Iunias. Flavius Secundinus scripsi rogatus a Memmio Asclepi quia se lit[ter]as scire negavit, ita quod dixit se locas[se] et locavit operas s[ua]s opere aurario Aurelio Adiutori ex ha[c] die

[220] Knapp, *Invisible Romans*, 225, 228, 268. Wiedemann, *Emperors and Gladiators*, 108 shows that the Tribune of the Plebs, the official in charge of protecting the interest of citizens, oversaw the oath of free gladiators. See also Junkelmann, *Familia Gladiatoria*, 33 on the freedom of movement of free gladiators.

[221] Dunkle, *Gladiators*, 38.

[222] Dunkle, *Gladiators*, 51.

[223] For a full discussion of this aspect, see Dunkle, *Gladiators*, 60–61.

[224] See Elkington, D. "Roman Mining law" 1988 *BPS* (10-4), 197–205, 200; Brunt, 1980 *JRS* (70), 81–100, 90–91. See also Sánchez-Palencia, J., Orejas, A. and Sastre, I. "Roman Gold Mines: Legal and Territorial Practices" in *Sfruttamento, tutela e valorizzazione del territorio* (Naples 2007), 181–193 who (182) maintain that during the first three centuries CE gold mines were as a rule under state control owing to the importance of gold for the Roman currency. See also most recently Hirt, A. *Imperial Mines and Quarries in the Roman World: Organizational Aspects 27 BC–AD 235* (Oxford 2010) *passim*. Ciulei, G. "Die Arbeitsverträge in den siebenbürgischen Wachstafeln" 1991 *RIDA* (38), 121–151, 126 maintains that the absence of any reference to slaves in these contracts is because slavery was not well developed in Dacia during this period.

[225] Berger, 1948 *Classical Philology* (43-4), 231–242, 233. For a recent discussion of these texts, see Möller, *Freiheit*, 41–52.

> [in] idus Novembres proxsimas [(denariis) se]ptaginta cibarisque. [Mercede]m per [te]mpora accipere debebit. S[ua]s operas sanas valentes [ede]re debebit conductori [s(upra) s(cripto)]. Quod si invito condu[c]tore recedere aut cessare voluer[it, da]re debebit in dies singulos (sestertios) V numeratos de sum[ma m]erced[is. Quod si] fluor impedierit, pro rata computare debeberi[t]. Conduc[to]r si tem[po]re peracto mercedem sol[v]endi moram fecerit, ead[em] p[oena] tenebitur exceptis cessatis tribus. Actus Immenoso maiori. Titus Beusantis, qui et Bradua. Socratio Socrationis. [M]emmius Asclepi.
>
> Under the consulship of Macrinus and Celsus, on the thirteenth day before the Calends of June. I, Flavius Secundinus, wrote this at the request of Memmius, son of Asclepius, because he said that he was illiterate. He declared that he had let out on on hire his services, and he hired out his services (as a laborer) in the gold mine to Aurelius Adiutor from today until the Ides of November next for 70 *denarii* and board. He shall receive the wages on (fixed) dates. He shall render his services as those of a healthy workman and valuable to the above-mentioned *conductor*. If he should withdraw or interrupt (his work) against the will of the *conductor*, he shall pay five sesterces for each day, to be counted from the sum of the wages. Should inundation impede (the work), he shall calculate a proportional reduction (of the wages). Should the *conductor* make a delay in the payment of the wages, he will be subject to the same penalty, three days being excepted (from penalty). Done at Immenosus Maior. (Three signatures.) [Berger translation]

This inscription provides a unique perspective on matters commonly discussed by the Roman jurists in abstract terms. The wording employed by the drafter of this *lex*, especially in referring to the illiterate Memmius, the son of Asclepius, is also visible in the *Sulpicii* tablets on letting and hiring of spaces in a warehouse which will be discussed in chapter three. The language of this *lex* closely follows the law.[226] Kloft has suggested that there may have been a standard *formula* for these types of contract.[227] This seems likely. A number of observations may be made about this *lex*. It is not possible to ascertain the status of Memmius, but Berger has plausibly argued that he could not have been a slave given the penalty clauses included in the contract.[228] Nothing is known about the drafter who acted on behalf of Memmius, but it has been suggested that he was probably a (servile) clerk in

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226 Berger, 1948 *Classical Philology* (43-3), 231–242, 235.

227 Berger, 1948 *Classical Philology* (43-4), 231–242, 240; Kloft, H. "Arbeit und Arbeitsverträge in der griechisch-römischen Welt" 1984 *Saeculum* (35), 200–221, 216.

228 See Riccobono, S. et al. (eds.) *Fontes Iuris Romani Anteiustiniani*, vols. 3 (Florence 1940–1943)—*FIRA* III, 467 note 1; Berger, 1948 *Classical Philology* (43-3), 231–242, 233. Sánchez-Palencia, *Roman Gold Mines*, 186–187 has also pointed out that the *civitates* around Roman gold mines often were under a duty to provide free workers to the mine.

the office of the administation of the gold mine.[229] It is difficult to conclude whether this document is meant to embody the entire contract between employer and worker. It contains all the necessary detail to create a contract of letting and hiring according to Roman law, but Berger has rightly concluded that the absence of detailed rules such as the hours or kinds of work suggests that this document should be read against the backdrop of the existence of more general conventions on mining which operated in this type of industry.[230] This would not be incompatible with the practice visible in the renting out of *insulae* which will be discussed in chapter three below. The absence of any detailed description of the *operae* which must be performed suggests that it was not of a specialist kind.[231]

The term of the contract was five months.[232] The use of the double *formula ... se locare/operas suas locare* is noteworthy.[233] Given the nature of Roman legal drafting, it was most likely used to prevent any uncertainty. The nature of the *operae* to be rendered by the employee is not described in detail except that he is contractually obliged to provide these *sanae valentes*. It was presumably the task of the employer to ascertain whether the *operae* rendered were of the necessary standard. Any deviation from this (which could then be identified as an example of *dolus* or *culpa*) would entitle the employer to terminate the contract.[234] Payment is specified in the contract as being 70 *denarii* plus board.[235] The date and manner of payment seems to have been left to the custom of the parties.[236] One of the other documents mentions an advance being negotiated in the contract with the rest of

[229] Berger, 1948 *Classical Philology* (43-3), 231–242, 232.
[230] Berger, 1948 *Classical Philology* (43-3), 231–242, 235; Brunt, 1980 *JRS* (70), 81–100, 90–91.
[231] Berger, 1948 *Classical Philology* (43-3), 231–242, 239.
[232] Kloft, 1984 *Saeculum* (35), 200–221, 215.
[233] Thomas, 1961 *BIDR* (64), 231–247, 234. Möller, *Freiheit*, 42–45, in light of recent academic opinion on the matter, regards the phrase “se locare/operas suas locare” as an example of pleonasm. This view is shared by Platschek, J. “Zum formulär der Dakischen Arbeitsverträge” 2004 *JJP* (34), 97–105. It does not in any way signify a change of status, see 98–104. For an alternative view, see Ciulei 1991 *RIDA* (93), 121–151, 139–140.
[234] Compare Berger, 1948 *Classical Philology* (43-3), 231–242, 239 who argues that there were no specific provisions made for illness of the worker, since D.19.2.38 pr (Paul. 1 Reg.) states that a worker could still claim wages under Roman law if the reason why such services could not be rendered was not owing to his own fault.
[235] Kloft, 1984 *Saeculum* (35), 200–221, 215. In his view, the low wage suggests a low status, see 217, but the existence of this contract also suggests that the parties were aware of their rights and were prepared to enforce them in a court of law. See also Möller, *Freiheit*, 44–45.
[236] Berger, 1948 *Classical Philology* (43-3), 231–242, 236 argues that the times of payment were probably fixed in general mining regulations which existed outside this contract.

the payment being paid monthly.[237] While it has been suggested that the wage mentioned in this *lex* is fairly poor (especially when compared to the high penalties for contravening the contract), Berger has noted that the provision of board adds to the value of the wage.[238] No mention is made of lodging.[239]

The contract contains penalty clauses. If the worker withdrew from the contract against the will of the employer or ceased work, he shall pay a penalty of five *sesterces* per day deducted from the wage owed. One aspect of this contract which has provoked some comment is the way in which the consequences of inundation are regulated. In the case of flood, which presumably rendered working in the mine impossible, the financial risk seems to fall to the worker.[240] According to the contract, the wage will be calculated *pro rata* to reflect the amount of work done. This is a textbook example of a contractual remission of rent and is in keeping with Roman juristic thought on letting and hiring in which the proportionality of performance and counterperformance has been established. As Berger has demonstrated, this apportionment of risk differs from other statements in the Digest.[241] This is to be expected since an overarching rule relating to the regulation of contractual risk did not exist in Roman law. Instead, the apportionment of risk arose out of a specific scenario. Since the contractual remission of rent formed part of the contract, it had to be assumed that the employee had agreed to it. Thus, where a dispute arose, the fact of remission could not be disputed, merely whether it was justifiable in the circumstances.

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237 See *FIRA* III, 468. See also Möller, *Freiheit*, 45.

238 Berger, 1948 *Classical Philology* (43-3), 231–242, 237, 238.

239 Ciulei 1991 *RIDA* (93), 121–151, 145 argues that the free movement of mine workers were restricted by contracts such as this.

240 Berger, 1948 *Classical Philology* (43-3), 231–242, 238; Kloft, 1984 *Saeculum* (35), 200–221, 216 sees parallels with the *Lex Metalli Vipascensis*. See also Ciulei 1991 *RIDA* (38), 121–151, 131–133.

241 Berger, 1948 *Classical Philology* (43-3), 231–242, 238, 239. More specifically, it contravenes D.19.2.38 pr, but Berger, 1948 *Classical Philology* (43-3), 231–242, 239 has argued that the rule expressed in the latter text should not be viewed as one with general application. It also cannot be ruled out that Paul's comment in D.19.2.38 pr may have been affected by the Imperial enactment which clarified the law in favour of the scribe in D.19.2.19 (Ulpian. 32 ad Ed.). This view is also shared by Knothe, H.G. "Zur lohngefahr bei der *locatio conductio operarum* nach jüngerem gemeinen Recht" 1999 *OIR* (5), 103–133, 114. See also Möller, *Freiheit*, 47–52. It is undoubtedly the case that parties could vary the default rules on the apportionment of risk, see Berger, 1948 *Classical Philology* (43-3), 231–242, 240; Brunt, 1980 *JRS* (70), 81–100, 91. See also Ciulei 1991 *RIDA* (38), 121–151, 141–142.

5.2. *Unspecified* Operae

Roman legal texts contain little information about the letting and hiring of unspecified *operae* rendered by free persons. Though certain legal texts allude to them, it is virtually impossible to speculate about detail such as the form or content of such agreements.[242] Literary evidence does not provide much more information either. The two most commonly cited examples are the casual workers rented to work in a vinyard in *Math.* 20.1–15 and Corax the free porter in Petronius, *Sat.* 117. The reason for the paucity of evidence is disputed. Traditionally, it has been attributed to the menial nature of the *operae* forming the core of *locatio conductio operarum* and the abundance of slaves in the Roman workforce.[243] While these arguments are broadly persuasive, Brunt has argued that the absence of direct evidence should not be taken to mean that most casual work was done by slaves.[244] In his view the lack of evidence both in legal and epigraphic sources might also be evidence of the "middle-class" perspectives of the authors of these texts.[245]

No discussion of this aspect would be complete without reference to the much debated topic of the *mercennarius* (and the related term *operarius*).[246] At the outset it is worth mentioning that these terms do not feature extensively in Roman legal texts.[247] The focus of the ongoing and much contested debate is the precise meaning of these terms and whether they denoted slaves or free persons.[248] The debate is best summed up by the opposing views of Bürge and Möller. Bürge, who essentially follows the thesis of Martini first proposed in 1958, maintained that the term referred primarily to slaves (belonging to other people) who were rented to work in the household alongside slaves owned by the family.[249] As such, these slaves

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242 Brunt, 1980*JRS* (70), 81–100, 89 shows there are only nine texts in the Digest and one in Code dealing with free "labour".

243 See, however, Kloft, 1984 *Saeculum* (30), 200–221, 219 who argues that letting out of *operae* by free persons was far more important factor in Roman society than has previously been acknowledged. See also Möller, *Freiheit*, 3.

244 Brunt, 1980 (70)*JRS*, 81–100; Waldstein, W. *Operae Libertorum* (Stuttgart 1986), 88.

245 Brunt, 1980 (70)*JRS*, 81–100, 89.

246 Brunt, 1980 (70)*JRS*, 81–100, 99–100 for a summary of the main points.

247 The term *mercennarius* is used in connection with letting and hiring in D.39.5.6 (Ulpian. 42 ad Sab.), D.47.2.90 (Ulpian. 1 de Poen. Pagan.) and D.48.19.11.1 (Macer 2 de Public. Iudic.). The term *operarius* is used in connection with the contract of letting and hiring in D.7.8.12.6 (Ulpian. 17 ad Sab.) and D.14.3.5.10 (Ulpian. 28 ad Ed.).

248 See also Elia, F. "Opera aratoriae, sartoriae, satoriae e messoriae nella familiae aziendali dell'Africa romana" in *L'Africa romana* (Rome 2010), 871–880.

249 Bürge, A. "Der *mercennarius* und die Lohnarbeit" 1990 *ZSS* (rA) (107), 80–136. The work

were regarded differently by the Roman jurists than slaves who worked in the domestic sphere.[250] For all the apparent force of his argument, however, Bürge has since admitted that some texts used by him to construct this hypothesis indicate that free workers were also called *mercennarii*.[251] Möller, in a forceful deconstruction of Bürge's article, essentially built on Macqueron's view that the term *mercennarius* referred to a free worker who did not form part of the *familia* of his employer and was not in the position of a slave.[252] She demonstrated that the examples used by Bürge to support his theory were open to interpretation and that a wider investigation of the social aspects of the term did not support his interpretation.[253] In her view, the term always referred to free work and where slaves were involved these were clearly described as *servus mercennarius*.[254] But this does not explain why the legal sources pay so little attention to the *mercennarii*. Möller's view is that the absence of juristic discussions on the topic may be an indication that these workers operated on a level which did not pique the interests of the Roman jurists.[255]

6. Letting and Hiring of *Operae* and the Roman *Familia*

In his survey of *locatio conductio operarum*, Mayer-Maly argued that the *operae* of freedmen and those of slaves were excluded from the scope of the contract.[256] This argument was based on the premise that any references to self-*locatio* of slaves were post-classical developments which had been introduced into the texts at a later point and that any references to the letting and hiring of *operae* of freedmen did not represent commercial contracts, but had to be read in the context of the relationship between patron and client. Let us examine these categories.

referred to is that of Martini, R. *Mercennarius: contributo allo studio dei rapporti di lavoro in diritto romano* (Milan 1958). See also Martini, R. "*Servus perpetuus mercennarius est*" 1989 *Labeo* (35), 189–199. See also on this general subject Treggiari, *Freedmen*, 52.

250 Bürge, 1990 *ZSS* (rA) (107), 80–136, 112.

251 Bürge, 1990 *ZSS* (rA) (107), 80–136, 116.

252 Macqueron, 1959 *RHDFE* (37), 600–616; Möller, C. "Die *mercennarii* in der römischen Arbeitswelt" 1993 *ZSS* (rA) (110), 296–330.

253 Möller, 1993 *ZSS* (rA) (110), 296–330, 319.

254 Möller, 1993 *ZSS* (rA) (110), 296–330, 330.

255 Möller, 1993 *ZSS* (rA) (110), 296–330, 319.

256 Mayer-Maly, *Locatio conductio*, chapter 11.

6.1. Operae *of Freedmen*

Freedmen were manumitted slaves bound to their former owner through a legally binding oath which imposed various duties on them.[257] One of the duties arising from the oath entailed the provision of *operae* by the freedman to the benefit of the patron.[258] Could these fall within the ambit of the contract of letting and hiring? Duff identified two types of *operae* of the freedman, namely *operae officiales* (domestic) and *operae fabriles* (professional).[259] Since the patron might not require professional *operae* at all time, a practice arose whereby patrons could rent out the skilled *operae* of their freedmen for money.[260] At first, patrons were permitted to let out *operae officiales* of their freedmen without restriction, but this entitlement seems to have been curtailed by the enactment of the *Lex Aelia Sentia* of 4 CE after which patrons were only allowed to let these out in two cases, namely when they were in financial dire straights or did not have any use for them.[261] This may account for the view found in Roman legal texts that when a patron rents out the *operae* of his freedmen it is not done "for profit" (but out of necessity). This scenario is described in a small number of legal texts in which the services of *libertini* are brought in connection with the contract of letting and hiring.[262]

> D.38.1.25 pr-1, 4 (Iulian. 65 Dig.)[263] Patronus, qui operas liberti sui locat, non statim intellegendus est mercedem ab eo capere: sed hoc ex genere operarum, ex persona patroni atque liberti colligi debet. 1. Nam si quis pantomimum vel archimimum libertum habeat et eius mediocris patrimonii sit, ut non aliter operis eius uti possit quam locaverit eas, exigere magis operas quam

[257] Treggiari, *Freedmen*, 75. See more recently Mouritsen, H. *The Freedman in the Roman World* (Cambridge 2011), 36–65, 224–226 as well as Waldstein, W. "Soziale Schutzrechte im klassischen römischen Recht" in *Festschrift für Hubert Niederländer* (Heidelberg 1991), 181–194.

[258] Treggiari, *Freedmen*, 94.

[259] Duff, A. *Freedmen in the Early Roman Empire* (Oxford 1928), 44–45.

[260] Crook, *Law and Life*, 192. See also Behrends, O. "Die Rechtsformen des römischen Handwerks" in *Das Handwerk in vor- und frügeschichtlicher Zeit* vol. 1 (Göttingen 1981), 141–203, 184–192. It is important to note, as Waldstein, *Operae Libertorum*, 383 has done that the patron could not let out the *operae* of the *libertinus* for any other purpose than those due to the patron in terms of the oath.

[261] Contra Jaubert, P. "La *Lex Aelia Sentia* et la *locatio conductio* des *operae liberti*" 1965 *RHDFE* (45), 5–21, but see Treggiari *Freedmen*, 76.

[262] See on this text Jaubert, 1965 *RHDFE* (45), 5–21. See D.38.1.25.4 (Iulian. 65 Dig.); D.38.1.37 pr (Paul. 2 ad Leg. Iul. Pap.) and D.48.19.11.1 (Marcian. 2 de Publ. Iudic.)

[263] See Jaubert, 1965 *RHDFE* (45), 5–21.

> mercedem capere existimandus est. 4. Nonnumquam autem ipsis libertis postulantibus patroni operas locant: quo facto pretium magis operarum quam mercedem capere existimandi sunt.
>
> The patron who hires out the services of his freedman is not immediately to be perceived to be making a profit out of him; but this can be inferred from the kind of services and from the character of the patron and his freedman. [1] For if someone has as a freedman a ballet dancer or mimic and is of such limited fortune that he cannot otherwise use his services than by hiring them out, he is to be considered as demanding services rather than as engaged in business. [4] But sometimes patrons provide services on hire at the request of the freedmen themselves; and, if they do, they are considered as taking a price for the services rather than making a profit from them.
>
> [Watson translation]

Suffice it to say that Mayer-Maly's blanket exclusion of the *operae* of freedmen from the ambit of *locatio conductio* requires revision. It is clear from more recent interpretations that patrons could rent out the *operae* of their freedmen under certain conditions and that these could fall within the ambit of *locatio conductio*. It is worth noting, of course, that these *libertini*, since they were free, could also rent out their own *operae* using the contract of letting and hiring as long as such endeavours did not conflict with the performance of *operae* owed to the patron.

6.2. Operae *of Slaves*

Roman legal texts focus on two distinct scenarios in which the *operae* of slaves were let out using the contract of letting and hiring.[264] The first of these is where the owner or a third party with rights in the slave let its *operae* out.[265] This practice is well documented in Roman legal texts.[266] Given what has been said thus far regarding the untechnical use of terminology, however, it must be assumed that a fine line existed between the letting of a slave as a thing (*locatio conductio rei*) and the letting of the *operae* of a slave (as *locatio conductio* of *operae*). Unfortunately, the evidence is slight and it is difficult to draw many general conclusions. In all likelihood, the distinction would have been motivated by the parties' intention and whether the slave possessed a particular skill which the owner wished to profit from (and protect contractually). It is clear that this topic did not pique the

264 Behrends, *Die Rechtsformen*, 183–184.

265 For a perplexing example, see the case cited in De Ligt, L. *Fairs and Markets in the Roman Empire* (Amsterdam 1993), 224.

266 See D.7.8.12.6 (Ulpian. 17 ad Sab.). See also Buckland, W.W. *Roman Slave Law* (Cambridge 1908), 265.

interests of the jurists to any great extent. I will return to this matter in the next chapter concerning the letting of slaves as things.

The second scenario is whether slaves could let out themselves or their *operae* unilaterally under the contract of letting and hiring. Certain Roman legal texts seem to show that this happened, but the authenticity of these sources has been questioned.[267] Two questions that will be addressed are whether such an agreement between a slave and a third party could be classified as *locatio conductio* and what the nature of the relationship between the owner of the slave and the third party who contracted with the slave would have been. Slaves could act independently from their owners in a commercial capacity using the *peculium*. It therefore stands to reason that slaves who had a particular commercial skill should have been able to let out their *operae* for profit. In such cases, matters of contractual liability would have been resolved using the *actiones adiecticiae qualitatis*.[268] Although this scenario must have been the most common, it does not feature extensively in Roman legal texts. Instead, most of the texts appear in the context of usufruct where a third party held the slave in usufruct.[269] Let us look at two examples:

> D.7.1.25.2 (Upian. 18 ad Sab.) Si operas suas iste servus locaverit et in annos singulos certum aliquid stipuletur, eorum quidem annorum stipulatio, quibus usus fructus mansit, adquiretur fructuario, ….
>
> Suppose a slave held in usufruct hires out his services and stipulates for a fixed sum to be paid every year. The rights flowing from this stipulation, insofar as they relate to the years during which the usufruct lasts, will be aquired for the usufructuary: … [Watson translation]
>
> D.7.1.26 (Paul. 3 ad Sab.) Si operas suas locaverit servus fructuarius et inperfecto tempore locationis usus fructus interierit, quod superest ad proprietarium pertinebit. Sed et si ab initio certam summam propter operas certas stipulatus fuerit, capite deminuto usufructuario mortuove eo idem dicendum est.

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[267] Thomas, 1961 *BIDR* (64), 231–247, 232–233. While Thomas accepts the idea of slaves letting themselves out as being classical, he adds that any contract of this kind could not be valid at civil law. In his view it was exactly for reasons such as these that the *actiones adiecticiae qualitatis* were created. See also Inst.Gai.2.91–92; D.7.7.3 (Gaius 7 ad Ed. Prov.) and D.15.1.37.3 (Iulian. 11 Dig.).

[268] Brunt, 1980 *JRS* (70), 81–100, 89.

[269] See D 7.8.14 pr (Ulpian. 17 ad Sab.) for a scenarios where those who had *usus* in a slave attempted to rent out its *operae*. Compare the restrictions imposed on the use of a slave in D.16.3.1.9 (Ulpian. 30 ad Ed.). See also D.12.6.55 (Papin. 6 Quaest.) where someone rented out the *operae* of a slave while pretending to have the right to do so. See also Buckland, *Roman Slave Law*, 370.

> If a slave held in usufruct hires out his services and, before the expiry of the period agreed on for the hire, the usufruct comes to an end, the remainder of the term enures to the benefit of the bare owner. Again, if at the outset the slave stipulates for a fixed sum as the return for the performance of predetermined services, the same rule applies if the usufructuary undergoes a change of civil status. [Watson translation]

The main focus of both texts is the usufruct of a slave where ownership continues to reside with the bare owner, but where its use and enjoyment has been granted to a third party. One of the main legal benefits of a usufruct was that its holder could draw civil or natural fruits from the object, for example, by renting out the object of the usufruct in order to generate revenue.[270] In these two texts, the object of the usufruct, the slave, seemingly took the initiative personally and rented himself out to a third party. The use of the verb *locare* at first sight suggests that the slave in this case rented out his *operae* under the contract of letting and hiring. This would of course be contrary to Roman law, since slaves did not have contractual capacity, but if this text is viewed in a more general context it acquires another level of meaning. The use of the verb *locare* in this case must be taken to describe a factual transaction which, for want of a different word, was a *locatio conductio* in the practical if not the legal sense.[271] It may also be the case that the slave entered into this transaction at the behest of the usufructuary. This could have been done because the holder of the usufruct did not require the type of *operae* which the slave could offer. It has been suggested that in such cases either a fixed amount or a proportion of earnings was given to the usufructuary.[272] The peculiar nature of this transaction is further confirmed by the reference to a *stipulatio* for payment. In a consensual contract of letting and hiring, a separate stipulation for payment would not have been required. The stipulation therefore must have been used in this case to bind the third party.[273] One final point deserves mention. Given that slaves could rent out their *operae* to third parties to the benefit of those holding a usufruct over them, it begs the question whether a slave could buy himself out of work by renting his own *operae* from the usufructuary and by paying for them using money earned from other commercial activities. Two texts

270 See on this type of letting and hiring, Thomas, J.A.C. "*Locare usumfructum*" 1971 *IJ* (6), 367–371.

271 Thomas, 1961 *BIDR* (64), 231–247, 232. See for example also D.48.15.6.1 (Callistrat. 6 de Cognit.) where runaway slaves "rented out" their *operae* for food.

272 Brunt, 1980 *JRS* (70), 81–100, 89. See also D.19.2.60.7 (Lab. 5 Post. a Iavoleno Epit.) and D.33.2.2 (Papin. 17 Quaest.).

273 Buckland, *Roman Slave law*, 265–266.

provide information about this. D.15.1.37.3 (Iulian. 12 Dig.) leaves the matter open for discussion, while Ulpian, citing Julian, in D.7.1.25.5 (Ulpian. 18 ad Sab.) describes this as a legal impossibility.

CHAPTER THREE

LETTING AND HIRING OF A *RES*

The *actio locati*

Quod Aulus Agerius Numerio Negidio fundum quo de agitur locavit, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret, absolvito.

Whereas the plaintiff (Aulus Agerius) let the *fundus* in question to the defendant (Numerius Negidius), whatever on that account the defendant ought to do or to give the plaintiff *ex fide bona*, oh judge, condemn the defendant to the plaintiff, and if not, absolve him. [Own translation]

The *actio conducti*

Quod Aulus Agerius de Numerio Negidio fundum quo de agitur conduxit, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret, absolvito.

Whereas the plaintiff (Aulus Agerius) rented the *fundus* in question from the defendant (Numerius Negidius), whatever on that account the defendant ought to do or to give the plaintiff *ex fide bona*, oh judge, condemn the defendant to the plaintiff, and if not, absolve him. [Own translation]

1. Introduction

Locatio conductio rei is by far the most prolific category represented in D.19.2 and C.4.65. At the heart of this category lay the reciprocal obligation expressed as *merces*—*uti frui* of a *res*. Phrased differently the *conductor* paid an amount of rent in return for the agreed (temporary) use and enjoyment of a thing belonging to the *locator* or a third party. As mentioned in chapter one, the Roman jurists did not see the *res* as the "object" of the contract nor did they view the *uti frui* of the *res* as "content of the obligation". This is a modern reinterpretation of Roman law, unfamiliar to the Roman jurists, whereby *locatio conductio rei* is discussed in terms of the rights and duties of the parties to the contract.[1]

[1] See, for example, Costa, *La locazione di cose*, III §1 and Johne, K-P. et al. (eds) *Die Kolonen in Italien und den westlichen Provinzen des römischen Reiches* (Berlin 1983), 183–191.

The phrase *uti frui* of the *res* requires further investigation. It appears in Roman legal texts only in connection with the letting and hiring of a *res* and was used by the Roman jurists to express the extent of the permissible use and enjoyment of a *res* at the basis of the contract of letting and hiring on which the parties had agreed at the start of the contract. There is sporadic evidence, spanning the entire classical and post-classical period, that the terms *uti* and *frui* were used with some precision in legal texts on *locatio conductio rei* both in Roman private and public law.[2] One of the earliest pieces of evidence is a passage from the *Lex Iulia Municipalis* (*Tabula Heracleensis*) of 45 BCE on letting and hiring in Roman public law.[3] The passage mentions two types of state leases, *vectigalia* (tax-farming) and *ultro tributa* (a comprehensive category of public services).[4] It shows that a *conductor* of *vectigalia* was entitled to its use and enjoyment (*uti frui liceat*) whereas the *conductor* of *ultro tributa* was merely entitled to its use (*aut uti*).[5] The distinction appears to be based on the expectation of profit in the case of *vectigalia*. A second piece of evidence is Iavolenus' epitome of Labeo's statement in D.32.1.30.1. This text, which deals with the renting of public gardens from the state, also shows that the terms *uti et frui* were used with precision.[6] A man had rented public gardens from the state. He died

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[2] See Costa, *La locazione di cose*, III § 2 who describes the phrase as embodying the sum total of the object's utility to the *conductor* either through the creation of new products by harnessing its natural capacity or by providing him and his dependants with personal use.

[3] Quibus locis ex lege locationis, quam censor aliusve quis magistratus publicis vectigalibus ultrove tributis fruendis tuendisve dixet, dixerit, is qui ea fruenda tuendave conducta habebunt, ut uti frui liceat aut uti ea ab eis custodiantur, cautum est: ei quo minus iis locis utantur fruantur ita, uti cuique eorum ex legel locationis iis sine dolo malo uti frui licebit ex H.L. nihilum rogatur—*Lex Iulia Municipalis* [T.H.], lines 73–76 in *FIRA* I, 146 [also in Crawford, M. et al. *Roman Statutes* I (London 1996), 365 (text); 375 (translation); 382 (commentary)].

[4] Letting and hiring of the right to collect taxes (*vectigalia*) was apparently seen as a type of *locatio conductio rei*, see Molnár 1982 *BIDR* (85), 127–142, 129.

[5] This distinction is supported by actual practice. Tax-farmers often sublet the collection of taxes in smaller regions, see Badian, E. *Publicans and Sinners: Private Enterprise in the Service of the Roman Republic* (Oxford 1972), chapters 1, 4. The entitlement of the *conductor* of *vectigalia* to the enjoyment is also mentioned in *Lex Agraria*, §§ 85; 87; 88–89 in *FIRA* I, 119. See more recently, Trisciuoglio, A. *Sarta tecta, ultrotributa, opus publicum faciendum locare—Sugli appalti relativi alle opere pubbliche nell'età repubblicana e augustea* (Naples 1998), chapters 1–3.

[6] D.32.1.30.1 (Lab. 2 Post. a Iavoleno Epit.) Qui hortos publicos a re publica conductos habebat, eorum hortorum fructus usque ad lustrum, quo conducti essent, Aufidio legaverat et heredem eam conductionem eorum hortorum ei dare damnaverat sinereque uti eum et

before the end of the term of letting and hiring and left the "fruits" of the contract of letting and hiring in his will to a third party (Aufidius) by way of a legacy with the instruction to his heir to transfer it (the lease) to said person and to permit the new *conductor* of the gardens both use and enjoyment. As in the previous example, the notion of economic profit from the public gardens appears to underlie the concept of *frui* in this text.

Having demonstrated that these terms were used with precision in Roman legal texts on *locatio conductio rei*, the meaning of *frui* needs to be established in context. The first point to make is that although there can be no doubt that the term could be used to denote a *conductor*'s personal enjoyment of the thing, it is not used in this sense in Roman legal texts. Where letting and hiring occurred purely for personal (as opposed to commercial) purposes such as habitation, different terminology was used and the term *frui* does not feature.[7] There can be little doubt that a semantic link existed between the deponent verb *fruor-frui-fructus/fruitus sum* and the noun *fructus*.[8] In the early history of *locatio conductio rei*, *fructus* primarily referred to the natural fruits of agricultural land to which the *conductor* was entitled upon gathering.[9] This remains the primary meaning of the term throughout classical Roman law.[10] So central were fruits to agricultural tenancy that a *conductor* of rural land rented for an agricultural purpose was contractually obliged to cultivate it to preserve its fertility (a specific manifestation of the notion of *frui*) and failure to do so provided grounds for

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frui. Respondi heredem teneri sinere frui: hoc amplius heredem mercedem quoque hortorum rei publicae praestaturum.

A man who had rented public gardens from the *res publica* left the fruits of those gardens to Aufidius up to the end of the five year lease and condemned his heir to pass on to him the lease of those gardens and allow him to use them and take the fruits. I replied that the heir was bound to let him take the fruits, and besides to pay to the *res publica* the rent of the gardens. [Watson translation].

7 See Amirante, L. *Locare Habitationem* in *Studi in onore di Biondo Biondi* I (Milan 1965), 457–465 for a comprehensive survey of the terminology used in letting and hiring for habitation.

8 On this, see recently Cardilli, R. *La nozione giuridica di 'fructus'* (Naples 2000), 75, 76, 129–132.

9 See comprehensively, Leonard, R. on *fructus* in Wissowa, G. and Kroll, W. *Pauly's Real-Encyclopädie der classischen Altertumswissenchaft* vol. 7(1) (Stuttgart 1910); Georg, H. on *fructus* in Ziegler, K. and Sontheimer, W. *Der kleine Pauly—Lexicon der Antike* vol. 2 (Stuttgart 1967); Schanbacher, D. on *fructus* in Canick, H. and Schneider, H. *Der neue Pauly—Enzyklopädie der Antike* vol. 4 (Stuttgart/Weimar 1998).

10 See D.19.2.15.2 (Ulpian. 32 ad Ed.); D.19.2.24.5 (Paul. 34 ad Ed.); D.19.2.33 (African. 8 Quaest.); D.43.3.16 (Ulpian. 67 ad Ed.).

the termination of the contract.[11] Since the sale of the fruits often generated the income necessary to pay the rent, tenancy of land in a rural location for agricultural purposes had an added economic aspect not found in examples of letting and hiring for personal use such as rooms in a tenement.[12] Thus, the term *frui* was predominantly used in Roman legal texts in the context of agricultural tenancy to refer to the *conductor*'s right to draw fruits from the property. From the second century CE, however, the term also appears in connection with the renting of urban property for habitation, especially as will be seen in the context of middlemen renting entire tenement blocks with the purpose of subletting spaces within them at a profit.[13] This is indicative of an extension of the meaning of the term *frui* and its correlative *fructus* to other forms of *locatio conductio rei* where the economic capacity of the object could be exploited to the *conductor*'s advantage. Ulpian's statements that rent of urban and agricultural property should be classed as fruits seem hardly surprising in this context.[14]

In this chapter, a distinction will be drawn between movable and immovable property.

2. Movable Property

Roman sources provide tantalising clues as to the sheer diversity of movable property which could be rented out. In D.19.2.9.4 (Ulpian. 32 ad Ed.), for example, the letting of a herd of cattle is mentioned, while epigraphic sources mention the letting of stage props.[15] Unfortunately, many of these references are too brief to permit any conclusions to be drawn. This chapter will therefore focus on those examples which contain sufficient detail.

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11 See D.19.2.51 pr (Iavolen. 11 Epist.); D.19.2.54.1 (Paul. 5 Resp.).

12 This explains the distinction drawn by Gaius in D.19.2.25.1 (Gaius 10 ad Ed. Prov.) Qui fundum fruendum vel habitationem alicui locavit, si aliqua ex causa fundum vel aedes vendat, curare debet, ut apud emptorem quoque eadem pactione et colono frui et inquilino habitare liceat: alioquin prohibitus is aget cum eo ex conducto.

A man who has let a farm, or let chambers, if for any reason he should afterwards sell the property, is bound to secure that the farmer or lodger shall be able to continue to occupy on the same terms, as if the tenant should be interfered with by the new owner, he will have an action on the contract against the original lessor. [Monro translation]. On *locare habitationem*, see comprehensively Amirante, *Locare Habitationem*, 463–465.

13 See African in D.19.2.35 pr (African. 8 Quaest.) and for a discussion of this development see extensively Cardilli, *Fructus*, 212–213, 138–239.

14 See D.5.3.29 (Ulpian. 15 ad Ed.) and D.22.1.36 (Ulpian. 61 ad Ed.).

15 Stage props CIL.6.5819.

2.1. *Storage Jars*

The two terms most commonly used in legal texts on the letting and hiring of storage vessels are *dolia* and *vasa*.[16] The former seems to have been stationary receptacles commonly sunk into the floor of a storage room, while the latter was, as a rule, movable.[17] One text is particularly informative regarding the letting of storage vessels:

> D.19.2.19.1 (Ulpian. 32 ad Ed.) Si quis dolia vitiosa ignarus locaverit, deinde vinum effluxerit, tenebitur in id quod interest nec ignorantia eius erit excusata: et ita Cassius scripsit. Aliter atque si saltum pascuum locasti in quo herba mala nascebatur: hic enim, si pecora vel demortua sunt vel etiam deteriora facta, quod interest praestabitur, si scisti, si ignorasti, pensionem non petes, et ita Servio Labeoni Sabino placuit.
>
> If a man lets out jars which without his knowledge are bad or cracked, and the wine runs out, he is compellable to pay full damages, and ignorance will be no excuse: with this Cassius concurs. This is not like the case of you leasing a forest pasturage where there were noxious weeds; there, if the lessee's cattle were poisoned or injured, you must pay the full damages, if you were aware of the facts; if you were not aware, you lose your right to the rent and this view is supported by Servius, Labeo and Sabinus. [Monro translation]

The central focus of this text is the contractual liability of the *locator* for a defective thing.[18] The solution proposed by Ulpian is that in a contract for the letting of storage jars where a defect in the jars caused the wine to drain away, the *locator* will be liable for the *conductor*'s loss (*id quod interest*) caused by the defective storage vessels irrespective of whether he was aware of the defect or not.[19] Ulpian draws upon the authority of Cassius.[20] This case is contrasted to the letting of pasture land in which harmful weeds grew. In this case the *locator* will be liable for the *conductor*'s loss (*id quod interest*) if he knew about its existence, but failed to disclose it. If he did not know

16 Mayer-Maly, *Locatio conductio*, 169–170, Fiori, *Locatio conductio*, 105–108.

17 Jakab, *Risikomanagement*, 10. See also Honsell, *Quod Interest*, 134.

18 For other texts where storage jars are mentioned in the context of letting and hiring, see D.19.2.19.2 (Ulpian. 32 ad Ed.) where the jars form part of the *instrumentum fundi* and thus have to be maintained by the *conductor* as well as D.18.6.1.3 (Ulpian. 28 ad Sab.) where storage jars containing wine is let out in the context of a complex sale. For a discussion of different types of storage jars, see Jakab, *Risikomanagement*, 7–8.

19 Honsell, *Quod Interest*, 135 states that in calculating the amount of *id quod interest*, account will be taken not only of the market price of the wine, but also of any associated losses suffered.

20 Compare D.19.1.6.4 (Pompon. 9 Sab.) where Minicius reports a response of Sabinus whereby storage jars which are let out have to be sound. Since this statement is later than the one reproduced above, it seems plausible that the dictum above influenced this decision.

about the existence of the weeds, he will (following the logic of the text) not be liable for the *conductor*'s loss (*id quod interest*), but will only lose his claim to the rent owed.[21] This view is supported by an illustrious pedigree of jurists which include Servius Sulpicius Rufus, Labeo and Sabinus.

Mayer-Maly has suggested, given the somewhat dense writing in the final two sentences, that this text was likely abbreviated.[22] In his view, the reason for Ulpian's distinction between the case of storage jars and that of pasture land lies in the inevitability of loss in the case of the storage jars.[23] This seems plausible, especially since *dolia* are known to have been sunk into the ground in farm complexes and Jakab also follows this interpretation of the text.[24] Thus, it might not have been immediately apparent that the *dolia* were defective and had caused the wine to drain away. Once the wine had been poured into the jars, damage will inevitably follow, whereas in the case of the pasture land it might be possible to mitigate loss by removing the cattle from the land as soon as the existence of the harmful weeds is detected.[25] Honsell describes this as a "guarantee of soundness".[26] The *locator*, by letting out the *dolia*, takes responsibility for their soundness, a type of implicit guarantee that the object is suitable for the use set out in the contract. As we shall see below in our discussion of the letting and hiring of immovable property, the same idea occurs there.

One aspect of the text which has captivated the attention of modern scholars is the difference between the solution regarding pasture land and the circumstances described in D.19.2.15.2 (Ulpian. 32 ad Ed.). In this celebrated text, which will be discussed in greater detail below, Ulpian apportioned the risk for loss arising from *vis maior* to the *locator* and for loss arising from *vitia ex ipsa re* to the *conductor*. In D.19.2.15.2, weeds are listed as an example of *vitia ex ipsa re* for which the *conductor* takes responsibility and therefore bears the loss.[27] D.19.2.19.1, which deprives the *locator* of his claim to rent if he knew about the weeds, should not be seen as contradicting Ulpian's statement in D.19.2.15.2 where loss arising from weeds

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[21] Cardilli, *L'Obbligazione di 'praestare'*, 229–233. See also Honsell, *Quod Interest*, 134 on the doctrine of knowledge/ignorance and its impact on the *quantum* of the claim.

[22] Mayer-Maly, *Locatio conductio*, 169 note 77.

[23] Mayer-Maly, *Locatio conductio*, 170.

[24] Jakab, *Risikomanagement*, 10.

[25] Added to this may be an element of what has been discussed in D.19.1.6.4 (Pompon. 9 ad Sab.) where it is stated that storage vessels which have been let out must be fit for purpose.

[26] Honsell, *Quod Interest*, 134–135.

[27] Admittedly, there is a slight difference between these cases since D.19.2.15.2 (Ulpian. 32 ad Ed.) is concerned with weeds that spoil a harvest by growing amongst them.

as *vitia ex ipsa re* is assigned to the *conductor*. If, as mentioned in chapter one, a context-based approached is required for terms such as *vis* and *vitium*, there is no contradiction between these two texts. It may well be, as Fiori has surmised, that the existence of the weeds predate the conclusion of the contract and that because the *locator* knew about them, he is saddled with the loss.[28] Two final points deserve mention. First, the solution proposed in the case of the pasture land demonstrates the flexibility (knowledge/ignorance) inherent in the *aestimatio litis* of the *bonae fidei iudicia* to develop a solution which took the fault of the *locator* into account.[29] It also seems likely that the notion of *bona fides* played an important role in establishing the *quantum* of the loss in this case.[30]

2.2. *Scales*

A single legal text discusses the case where scales were rented out:

> D.19.2.13.8 (Ulpian. 32 ad Ed.)[31] Si quis mensuras conduxerit easque magistratus frangi iusserit, si quidem iniquae fuerunt, Sabinus distinguit utrum scit conductor an non: si scit, esse ex locato actionem, si minus, non. Quod si aequae sunt, ita demum eum teneri si culpa eius id fecit aedilis. Et ita Labeo et Mela scribunt.
>
> A man hires measures, and the magistrate orders them to be broken up. If the measures were incorrect, Sabinus makes a distinction turning on the question whether the party who hired was aware of this fact or not; if he was, he is liable on the contract, otherwise not. But if the measures were correct, the hirer is only responsible in case it was owing to the negligence of his that the aedile acted as he did. Such is the view of Labeo and Mela. [Monro translation]

In dealing with the destruction of rented scales as ordered by the Aedile, Ulpian proposes a solution which draws its authority from the views of the jurist Sabinus.[32] Where a *conductor* rented scales from a *locator* and these were ordered to be destroyed for being unjust, the availability of a contractual action depended on the *conductor*'s level of knowledge. This is analogous to the idea explored above in relation to pasture land, but with a slight

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28 Fiori, *Locatio conductio*, 105–109. See also Müller, *Gefahrtragung*, 29–31.

29 Vacca, L. "Profili della 'risoluzione' nella *emptio venditio* e nella *locatio conductio*" in *Pacte, Convention, Contrat: Mélanges Bruno Schmidlin* (Basel 1998), 121–145, 139–140.

30 Cardilli, *L'Obbligazione di 'praestare'*, 229–233.

31 It seems likely that the text has been abbreviated, MacCormack, 1972 *ZSS* (rA) (89), 149–219, 198 note 145.

32 Mayer-Maly, *Locatio conductio*, 189; Cardilli, *L'Obbligazione di 'praestare'*, 357–359.

variation, since here it concerns the knowledge of the *conductor*. As Fiori has shown, the notion of *scientia* is particularly prevalent in the texts of Labeo and Sabinus.[33] The *locator* will have a contractual action against the *conductor* (for the destruction of the scales) if he knew that the scales were unjust, but will not have an action if he did not know.[34] Where the *conductor* had known that the scales were unjust and had used them in such a way as to cause them to be destroyed by the Aedile, he was seemingly at fault and the *locator* should be able to recover his loss *ex locato*.[35] If the *conductor* did not know, however, he could not be blamed for the destruction of the scales and no action was therefore available—the *locator* will lose his right to the rent. In the final part of the text, the scenario where unjust scales were destroyed by the Aedile is contrasted to a case where just scales were destroyed. In such a case, the *locator* would only have an action *ex locato* if this happened owing to the *conductor*'s fault.[36]

2.3. *Vehicles and Vessels*

Roman legal texts present a fragmented picture of the letting and hiring of vehicles and vessels. In the discussion of land and maritime transport in chapter two, it was noted that one of the modes which an individual could use to transport goods and passengers in Roman law was to rent the components (vehicles and vessels) required for transport and to complete the task personally or using slaves or freedmen. Such an arrangement exposed the *conductor* to a greater level of contractual risk in transporting his goods. As in the discussion of transport above, a distinction will be drawn between vehicles used for land transport and vessels used for transport by water. Letting and hiring of vehicles for land transport will be dealt with first:

> D.19.2.60.8 (Lab. Post. 5 a Iavoleno Epit.) Vehiculum conduxisti ut onus tuum portaret et secum iter faceret: id cum pontem transiret, redemptor eius pontis portorium ab eo exigebat: quaerebatur an etiam pro ipsa sola reda portorium daturus fuerit. Puto, si mulio non ignoravit ea se transiturum cum vehiculum locaret, mulionem praestare debere.

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[33] Fiori, *Locatio conductio*, 107 note 158.

[34] Fiori, *Locatio conductio*, 145–146 notes that *scientia* was particularly important in assessing the *bona fides* within the contract.

[35] MacCormack, 1972 ZSS (rA) (89), 149–219, 198.

[36] Compare the interesting observation concerning the penalty for those who use false scales in D.47.11.6.2 (Ulpian. 8 de Off. Procons.) Sed et divus Hadrianus eum, qui falsas mensuras habuit, in insulam relegavit.

The deified Hadrian, again, relegated to an island one who used false measures. [Watson translation].

> You hired a carriage bargaining that it should carry your goods and be driven to some place without you; when it came to a bridge the toll-keeper asked the driver to pay the toll; the question was whether the hirer would have to pay toll for the car by itself, though he was not in it. I should say that if the driver was aware that he would have to pass that way when you hired the carriage, he was bound to bear the expense of the toll. [Monro translation]

This text is a redaction by Iavolenus of the views of Labeo.[37] It is therefore virtually impossible to attribute the views contained in it to one of these two jurists. This may account for problems which some modern scholars have had with this text. Vigneron has observed that this text seems to be a hybrid of both *locatio conductio rei* and *operae*.[38] It demonstrates the fluidity of party autonomy since in this case it would appear that both a vehicle and a driver had been rented. Let the text speak for itself. A *conductor* rented an unspecified vehicle from a muleteer to transport goods and then to travel somewhere else without the *conductor* (… *secum iter facere* …).[39] At some point during the voyage, a toll keeper of a bridge demanded the toll from the muleteer. The question raised by Labeo/Iavolenus is whether the muleteer or the customer (*conductor*) is responsible for the toll. According to the jurists, the muleteer is responsible for the toll if he knew (*scientia*), when renting out the vehicle that it would have to pass the toll bridge and failed to inform the *conductor*.[40] This decision is in keeping with the principle of knowledge/ignorance already established into the two scenarios above. Furthermore, such a decision is financially sound. If, the contract of letting and hiring is one which is primarily aimed at making profit, the muleteer should have included this among his calculations and reflected it in the rent charged.

As in the case of vehicles rented for transport by land, the renting of (mostly maritime) vessels should be viewed in conjunction with those examples where a task (maritime shipping) has been let out.[41] There are a number of texts where it is difficult to establish whether they represent a case of *locatio conductio rei* or a hybrid. Thus, in D.14.2.10.1 Labeo/Paul debate the matter whether someone who had rented a ship to transport

37 Fiori, R. "Forme e regole dei contratti di trasporto marittimo in diritto romano" 2010 *Rivista del diritto della navigazione* (39-1), 149–176, 163–166.

38 Vigneron, *La conception originaire*, 515–516.

39 For a case where a vehicle is rented by two people collectively, see D.13.6.5.15 (Ulpian. 28 ad Ed.).

40 Fiori, *Locatio conductio*, 145–146.

41 See also Jakab, *Risikomanagement*, 252.

cargo has an action to recover the goods lost owing to the needless and unauthorised transfer of the cargo to a second ship which then sank.[42]

> D.14.2.10.1 (Lab. 1 Pith. a Paulo Epit.) Si ea condicione navem conduxisti, ut ea merces tuae portarentur easque merces nulla nauta necessitate coactus in navem deteriorem, cum id sciret te fieri nolle, transtulit et merces tuae cum ea nave perierunt, in qua novissime vectae sunt, habes ex conducto locato cum priore nauta actionem. PAULUS: immo contra, si modo ea navigatione utraque navis periit, cum id sine dolo et culpa nautarum factum esset. ...
>
> If you have chartered a ship for the carriage of your cargo and the captain needlessly transships the cargo to a less good vessel, knowing you would disapprove, and your cargo goes down with the ship when carrying it, you have an action on the charter party against the original captain. PAUL: But not if both ships go down on that voyage, in the absence of intentional or negligent fault on the part of the crew. ... [Watson translation]

In the first part of the text, Labeo argues that the contravention of the wishes of the *conductor* (perhaps expressed in a *lex*) constitutes *culpa* and the captain should be liable *ex conducto* for *id quod interest*. Paul, on the other hand, provides a more nuanced answer. An action will be available if fault can be proven on the part of the captain or his crew.[43] If the shipwreck occurred through *vis maior*, on the other hand, the captain will not be liable.[44]

The theme of liability based on fault is continued by the following text:

> D.19.2.61.1 (Scaev. 7 Dig.) Navem conduxit ut de provincia Cyrenensi Aquileiam navigaret olei metretis tribus milibus impositis et frumenti modiis octo milibus, certa mercede: sed evenit ut onerata navis in ipsa provincia novem mensibus retineretur et onus impositum commisso tolleretur. Quaesitum est an vecturas quas convenit a conductore secundum locationem exigere magister navis possit. Respondit secundum ea quae proponerentur posse.
>
> A man chartered a vessel to sail from the province of Kyrênê to Aquilea with a cargo of 3000 measures of oil and 8000 *modii* of corn for a specified freight; but, as it turned out, ship, cargo and all were detained in the African port for nine months, and the cargo was forfeited for non-payment of dues. It was asked,—Could the mast of the ship sue the charterer on the contract for the freight agreed upon. Answer: 'Yes, on those facts.' [Monro translation]

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42 On this text, see Fiori, 2010 *Rivista del diritto della navigazione* (39-1), 159–176.

43 MacCormack, 1994 *Index* (22) 189–209, 199. See also D.4.9.3.1 (Gaius 14 ad Ed.) where the letting of a ship is discussed in the context of the Edict *nautae caupones stabularii*.

44 Jakab, *Risikomanagement*, 252–255; Babusiaux, *Id quod actum est*, 230–232.

In the case discussed by (Quintus Cervidius) Scaevola, someone rented a ship for a fixed fee to transport goods.[45] The ship was detained for a long period of time and the goods were confiscated. The question posted is whether the *locator* (*magister navis*) could recover the rent from the *conductor*. Scaevola replied that he could "on the facts of the case". This is a particularly interesting response as it suggests that Scaevola's answer was dictated not so much by a general legal principle as by the specific circumstances of the case. Since the detention and confiscation of the cargo in *Aquileia* cannot be attributed to the fault of the *magister navis*, but may have been the fault of the *conductor*, the former should have a claim for rent.[46] This seems to point to the development of the notion of contractual risk in the contract of letting and hiring.

2.4. *Slaves and Animals*

In the discussion of letting and hiring of *operae*, examples of the letting and hiring of slaves and animals were briefly noted. As mentioned there, Roman legal texts also contain examples where slaves and animals were rented out as things.[47] It was also observed that the distinction between letting a slave as a thing and letting the *operae* of a slave must have been a fine one and most likely would have depended on the nature of the agreement between the parties. This is confirmed by following text:

> D.19.2.60.7 (Lab. 5 Post. a Iavoleno Epit.) Servum meum mulionem conduxisti: negligentia eius mulus tuus perit. Si ipse se locasset, ex peculio dumtaxat et in rem verso damnum tibi praestaturum dico: sin autem ipse eum locassem, non ultra me tibi praestaturum quam dolum malum et culpam meam abesse: quod si sine definitione personae mulionem a me conduxisti, et ego eum tibi dedissem cuius negligentia iumentum perierit, illam quoque culpam me tibi praestaturum aio quod eum elegissem qui eiusmodi damno te adficeret.
>
> You hire my slave, a mule-driver, and your mule is killed through the man's neglect. If the slave had hired out his own person himself, I am sure that I should only have to make good the damage on the footing of the action *de peculio et in rem verso*, but if it was I who let him out, my obligation goes no further than answering for the absence of *dolus malus* or negligence on my

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[45] See Mayer-Maly, *Locatio conductio*, 198; Fiori, *Locatio conductio*, 146 note 64.

[46] See Monro, *Digest XIX, 2*, 75 note to this text, following the view of Vangerow.

[47] It is sometimes difficult to classify these arrangements under the established Roman categories of contracts, see D.16.3.1.9 (Paul. 17 ad Ed.). On this text, see MacCormack, 1994 *Index* (22), 189–209, 197. See also D.19.2.54.2 (Paul. 5 Resp.). See also Knapp, *Invisible Romans*, 87 for a discussion of slave castanet players and singers which were rented out.

own part; if however you simply had engaged for some mule-driver or other, not saying who, and I let you have a man by whose negligence the animal was killed, then I agree that my responsibility would extend to the negligence I was guilty of in choosing a slave who caused the loss in question.

[Monro translation]

This text by Labeo/Iavolenus describes three modes for renting a skilled slave (a mule-driver).[48] Notice that the *conductor* supplies the mule. They are a) the *locator* lets out a specific slave to the *conductor*; b) the slave lets out himself to the *conductor*, and c) the *locator* lets out "a generic slave" to the *conductor* without specifying an individual. The chosen mode impacts on the contractual liability of the *locator*. In case a, the *locator* will be contractually liable for the loss suffered by the *conductor* (*id quod interest*) if *dolus* or *culpa* on the part of the slave can be proven.[49] This is compatible with the development of the notion of vicarious liability explained in chapter one. Liability for *dolus* and *culpa* was conventional for the contracts of letting and hiring, but there is no mention of *custodia* in relation to the mule. Case b raises the complex question surrounding the self-letting of slaves. As this text shows, self-letting could only occur within the context of a legal structure which permitted the *locator* to be held contractually liable for the loss caused by the slave. Thus, liability for loss is described in terms of the *actiones de peculio et in rem verso*. The final case is interesting. If the parties did not agree on a specific slave, but left it to the *locator* to choose one, he would be liable contractually if the *conductor* suffered loss owing to his poor choice—*culpa in eligendo*.[50] One final point to make about this text is that it does not mention noxal liability at all. It is unclear why Labeo/Iavolenus chose not to focus on this aspect. It may well be that since this case was one of a skilled expert slave, noxal liability was not a viable alternative given the value of the slave.

Two further texts on the letting of slaves deserve mention:

D.19.2.42 (Paul. 13 ad Ed.) Si locatum tibi servum subripias, utrumque iudicium adversus te est exercendum, locati actionis et furti.

If you hire a slave, and then appropriate him, you are liable in two ways, on the contract and for theft. [Monro translation]

[48] For criticisms of this text, see Thomas, 1978 *Acta Juridica*, 127–155, 129; Cardilli, *L'Obbligazione di 'praestare'*, 259–262.

[49] This is also confirmed in D.9.2.27.34 (Ulpian. 18 ad Ed.).

[50] MacCormack, G. "The Thievish Slave" 1972 *RIDA* (19), 345–365, 365, see also MacCormack, 1971 *RIDA* (18), 525–551, 545–546.

D.19.2.43 (Paul. 21 ad Ed.) Si vulneraveris servum tibi locatum, eiusdem vulneris nomine legis Aquiliae et ex locato actio est, sed alterutra contentus actor esse debet, idque officio iudicis continetur apud quem ex locato agetur.

If you hire a slave and wound him, you are liable for the injury both by the *lex Aquilia* and on the contract, but the party suing must confine himself to one of the two actions, and the judge in the action on the contract must take care that he does so, though you should not raise the point. [Monro translation]

These texts, both by Paul, demonstrate that one event may give rise to more than one legal consequence. As far as D.19.2.42 is concerned, it should be noted, given the wide scope of the Roman law of theft, that unauthorised use of the slave for a purpose not agreed by the parties in the *lex* could constitute theft of the slave. This is not an unimportant point as it suggests that in some cases (especially in the case of skilled slaves) the permissible use and enjoyment must have been specifically described in the contract especially where the owner sought to protect a valuable slave.[51] One aspect of these two texts which deserves further comment is the final sentence of D.19.2.43. Contractual and delictual actions could not be brought concurrently.

The issue of defects in the slave hired is explored in the following text:

D.19.2.45 pr-1 (Paul. 22 ad Ed.) Si domum tibi locavero et servi mei tibi damnum dederint vel furtum fecerint, non teneor tibi ex conducto, sed noxali actione. [1] Si hominem tibi locavero, ut habeas in taberna, et is furtum fecerit, dubitari potest utrum ex conducto actio sufficiat, quasi longe sit a bona fide actum ut quid patiaris detrimenti per eam rem quam conduxisti, an adhuc dicendum sit extra causam conductionis esse furti crimen et in propriam persecutionem cadere hoc delictum: quod magis est.

If I let you a house, and my slaves damage or steal your property, you cannot sue me on the contract, you can only bring a noxal action. [1] If you hire a slave of me because you want him to serve in a shop, and the slave steals your goods, it is a question whether an action on contract will meet the case,—such action being brought on the principle that it involves a serious departure from *bona fides* if you are to have to put up with a loss occasioned by the thing [i.e. the man] that you hired,—or whether the truth rather is not that in this case too a charge of theft is something that lies outside of hiring, this particular delict requiring special proceedings; which I am more inclined to hold. [Monro translation]

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[51] For an interesting analogy, see Du Plessis, P.J. "The Slave in the Window" in *By the sweat of your brow: Roman Slavery in its Socio-Economic Setting* (London 2010), 49–60 for detailed rules relating to the permitted use of slaves as objects of pledge or hypothec.

There are two scenarios discussed in this text. In the first place, a slave presumably forming part of the staff of a rented house, stole from the *conductor*. According to Paul, the owner of the slave is liable through a noxal action only and not the *actio conducti*. This case is contrasted to one where a slave which was specifically rented to work in a shop committed theft. In this case, the jurist asked whether a contractual action (the *actio conducti*) was sufficient.[52] Paul comes to the conclusion that both an *actio conducti* and criminal prosecution for theft was available. His reason, expressed in the final part of the text, is somewhat condensed. In Paul's view, the criminal prosecution for theft by a slave which, as we shall see below fell within the jurisdiction of the *Praefectus Vigilum*, was something distinct from the contract of letting and hiring and should therefore exist alongside it. But what is the basis of the distinction between the first and second scenario? In the first scenario it would seem that the slave merely came with the rented house as part of the *instrumentum*. The presence of a noxal action indicates a low-level unskilled worker which would have been cheaper to hand over than to pay compensation. This scenario is contrasted to the case where a shop slave which had been specifically rented causes loss by stealing from the shop owner. In this case, two actions are available, both one on letting and hiring as well as the criminal prosecution for theft in front of the *Praefectus Vigilum*.

As far as the letting of animals are concerned, information is scarce. Martin mentions the case in Apuleius' *Metamorphoses* where the character Lucius who, during a dream in which he imagines himself to have taken on the form of a donkey, is rented out to his neighbours while D.19.2.9.4 (Ulpian. 32 ad Ed.) mentions the letting of a flock of sheep.[53] One text is particularly informative:

> D.19.2.30.2 (Alfen. 3 Dig. a Paulo Epit.)[54] Qui mulas ad certum pondus oneris locaret, cum maiore onere conductor eas rupisset, consulebat de actione. Respondit vel lege Aquilia vel ex locato recte eum agere, sed lege Aquilia tantum cum eo agi posse qui tum mulas agitasset, ex locato etiam si alius eas rupisset cum conductore recte agi.

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[52] MacCormack, 1972 *RIDA* (19), 345–365, 356, 364.

[53] Martin, *Roman law*, 151–168, 162. See also the example mentioned in Knapp, *Invisible Romans*, 186–187 of a woman who let out camels.

[54] The first two sentences are generally taken to be that of Alfenus and the final passage "... sed lege ... agi." to be that of Paul. As Fiori has rightly identified, the overloading of the mule probably constituted a violation of the *lex* as agreed by the parties. For criticisms of the text, see Thomas, 1978 *Acta Juridica*, 127–155, 127–128.

> A man let out mules on the understanding that they were only to be loaded up to a specific weight, and the party hiring having nevertheless loaded the animals over that weight and severely injured them, the owner consulted the author. The answer was he had a good action either under the *lex Aquilia* or on the contract, but if he went on the *lex Aquilia* he could only sue the man who was driving the mules at the time, whereas under the contract he could sue the party who hired, no matter who injured the mules.
>
> [Monro translation]

It was possible for two different actions to arise out of the same set of facts. Paul's qualification towards the end demonstrates the application of the *lex Aquilia*.[55] For Aquilian liability to exist, damage must have occurred *corpori corpore* and a causal link must be shown to exist between the action and the result. Thus, the Aquilian action might have a more limited scope of application, whereas the *actio locati* could be brought against a wider range of people (most likely here the owner of a slave or the employer of a free employee).

3. Immovable Property

Recent works on letting and hiring such as those by Frier and De Neeve have employed the terms "urban" and "agricultural" tenancy to convey the idea that different legal solutions were developed by the Roman jurists to deal with specific cases of letting and hiring as it applied to immovable property. While useful, these terms are not synonymous and do not convey the full complexity of the Roman situation.[56] For this reason, this book will employ the terms "urban" and "rural" to describe the location where the contract of letting and hiring occurred, combined with further qualifications regarding the purpose of the contract in a specific context. But this terminological distinction must be applied with great circumspection. The distinction between "urban" and "rural" was fluid in Roman law and it is not always possible to ascertain from the texts (whether legal or otherwise) where immovable property was situated.[57] Furthermore, the location

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55 Cardilli, *L'Obbligazione di 'praestare'*, 277–282.

56 For criticisms of the approach of these two authors, see Capogrossi Colognesi, L. "Lavoro agricolo e strutture fondiarie" in *Terre, proprietarie e contadini dell'impero romano* (Rome 1997), 27–46, 39–40.

57 Goodman, P.J. *The Roman City* (London 2007), chapter 3. See, for example, the case of the letting of a pottery in Roman Egypt discussed in Jones, *Bankers*, 168 and of other commercial premises (169).

of immovable property was often less important than the type of use to which it could be put as in the law on servitudes.[58] While there is an obvious relation between the location of immovable property and its potential use in terms of the contract of letting and hiring, the subtlety and untechnical nature of the Roman legal terminology must not be overlooked.

3.1. *Immovable Property in a Rural Setting*

Before an overview of the different "normative" examples can be provided, certain general observations about renting of immovable property in a rural location are required. While generalisations of this kind are perilous, juristic discussions divulge a number of elements which can be used to build up an example in relation to letting and hiring of immovable property in a rural location. Juristic writing on tenancy of rural property has a definite "point of view".[59] The jurists generally envisioned larger estates situated in Italy. This means that it is difficult to draw conclusions from these texts about small-holdings in Italy or indeed larger estates in the provinces.[60] It needs to be stated at the outset that there are very few examples of the letting and hiring of immovable property in a rural location for personal use in Roman legal sources. Most cases refer to letting and hiring as a means to exploit the property economically.[61] The land envisioned by the jurists in their example sometimes contained buildings, often connected with the commercial exploitation of the land such as olive presses or granaries. The aim of the contract was to exploit the economic potential of the land, usually but not exclusively for an agricultural purpose, in return for the payment of an agreed rent.[62] Economic exploitation could be as straightforward as growing crops in the land to be harvested and sold, but certain texts point to other commercial uses of the land.[63]

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[58] Jolowicz, H.F. *Historical Introduction to Roman Law* (Cambridge 1932), 159 note 1.

[59] Buck, R.J. "Agriculture and agricultural practice in Roman law" 1983 *Historia* [Einzelschrift], 7–53, 8; Kehoe, *Investment*, viii; De Neeve, *Colonus*, 25–27.

[60] Kehoe, *Investment*, 139–140; Kehoe, *Law and the Rural Economy*, 12–13. A similar pointed is raised by Capogrossi Colognesi, *Lavoro agricolo*, 42–43.

[61] The term *colonus* appears in the mid-first century BCE to describe tenants of land in a rural location which has been let for an agricultural purpose, see Johne, *Die Kolonen*, 167–168. It is impossible to tell whether a distinction was drawn between the term *colonus* and the more general term *conductor*.

[62] Kehoe, *Investment*, 147. This was a continuous obligation, see D.19.2.55.2 (Paul. 5 Sent.) and Johne, *Die Kolonen*, 232–235.

[63] For improvements made by the *conductor* and his entitlement to reimbursement, see D.19.2.55.1 (Paul. 5 Sent.).

Depending on the nature of the exploitation, land could be rented out together with equipment (*instrumentum*) which included workers and the content of industrial complexes such as olive presses.[64] Where crops were produced, the jurists maintained that the owner of the land (as *locator*) remained owner of the standing crops on the basis of the principle of *accessio* until such time as they were harvested (that is both severed and collected) by the *conductor*, at which point ownership and risk transferred (presumably through a fictitious *traditio*).[65] The owner's consent appears to be implied in the continued existence of the contract of letting and hiring. The relationship between the income generated by the sale of the crops and the payment of rent is not fully explored in the texts.[66] It has to be assumed that much would have depended on the specifics agreed by the parties in the *lex*. Roman legal texts provide examples of different modes of rental payment, but the most common arrangement appears to have been annual payments spread over five years.[67] The payment of rent was secured in a number of ways, most commonly through real security.[68] Different forms of real security existed in relation to land.[69] The parties could agree on specific items as security, but apart from these a category of securities implied by law existed as well. These included *invecta et illata* as well as standing crops.[70]

3.1.1. Ager

The term is defined in modern works on Roman law as "any kind of rural land, both arable and pasture, not including buildings and *villae* (country-houses, farm-houses)."[71] Land of this kind was almost exclusively rented out for an economic purpose and it seems reasonable to assume, in light of D.24.3.7.8 (Ulpian. 31 ad Sab.)[72] that in some cases an agreement was reached

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64 Johne, *Die Kolonen*, 199–202. The term *instrumentum* is never defined by the jurists and it would seem that its content was determined by the context of the contract.

65 Crook, *Law and Life*, 155–156; Johne, *Die Kolonen*, 195–199.

66 Kehoe, *Investment*, 213–214.

67 Johne, *Die Kolonen*, 225–240; De Neeve, *Colonus*, 10; Kehoe, *Investment*, 147–149.

68 Kehoe, *Investment*, 152.

69 For a comprehensive discussion of this aspect and the contractual remedies available to the parties, see Johne, *Die Kolonen*, 202–207.

70 De Neeve, *Colonus*, 8–9; Johne, *Die Kolonen*, 202–223; De Ligt, *Fairs and Markets*, chapter 4. For a discussion of the *Interdictum Salvianum* which could be used to obtain the pledge, see De Neeve, *Colonus*, 47–53, 98–100.

71 Berger *Encyclopedic Dictionary*, entry on the term *ager*. See also Buck, *Agriculture*, 15. It has as a synonym the term *locus*.

72 Item si locatio agri talis sit, ut super annuam mercedem quinquennio quoque aliquid amplius praestaretur: in eo enim quod amplius est tempus ad quinquennium computamus.

that the rent consisted not merely of a sum of money, but also of other contributions such as part of produce, especially where the aim of the contract was agricultural production.[73] It would have been a matter of contractual interpretation whether such an agreement constituted letting and hiring or sharecropping. D.33.7.12.8 (Ulpian. 20 ad Sab.) shows that an *ager* could be rented out with *instrumentum* which in this case included both slaves and animals.[74] Agricultural production was not the only economic purpose an *ager* could serve under the contract of letting and hiring. D.11.7.9 (Gaius 9 ad Ed. Prov.) refers to an *ager* being rented to inter corpses and D.47.2.52.8 (Ulpian. 37 ad Ed.) discusses the entitlement of the tenant to sue someone, who has removed sulphur from the sulphur pits located on the rented *ager* without permission, for theft. For whichever purpose the *ager* was rented out, it seems clear from D.19.2.15.1 (Ulpian. 32 ad Ed.) that the *locator* had to provide the *conductor* with physical control of the property for the duration of the contract and to maintain it according to the standards agreed by the parties. Failure to do that constituted a violation of the contract and enabled the *conductor* to terminate the contract and to bring the *actio conducti*.

One aspect of the letting and hiring of an *ager* which has provoked much academic debate is the matter of remission of rent:[75]

Again, if the lease over the land is of the kind where something must be paid over and above the rent every five years, we must calculate the extra amount on the basis of how much of the five-year period has elapsed. [Watson translation].

[73] See the entitlement of the usufructuary to the rent, D.7.1.59.1 (Paul. 3 Sent.) and for a different case D.19.1.13.11 (Ulpian. 32 ad Ed.).

[74] Si aliqua parte anni in fundo pascantur pecora, aliqua parte his pabulum conducitur vel servi, si aliqua parte anni per eos ager colitur, aliqua parte in mercedem mittuntur, nihilo minus instrumento continentur.

If beasts are pastured on the farm for part of the year and for part fodder is brought for them or if slaves cultivate the land for part of the year and are hired out for part, they, nonetheless are included in the instrumentum. [Watson translation].

[75] For an extensive survey of recent literature on this topic, see Johne, *Die Kolonen*, 226–232 and more recently Fiori, *Locatio conductio*, 98–111 and Capogrossi Colognesi, *Remissio mercedis*, generally. The legal foundation of *remissio mercedis* remains controversial, while authors like Kehoe, *Investment*, 224–226 (also Kehoe, *Law and the Rural Economy*, 109–123, 226–232) and Frier, B.W. "Law, Economics and Disasters down on the Farm: *remissio mercedis* Revisited" 1989–1990 *BIDR* (31–32), 237–270 argue that there is no clear justification for it (apart from perhaps economic considerations), others such as De Neeve, *Colonus*, 226–232 and Capogrossi Colognesi, *Remissio mercedis*, 12 merely see it as a particular application of the notion of *periculum*. See also Crook, *Law and Life*, 157; Harke, J.D. *Locatio Conductio, Kolonat, Pacht, Landpacht* (Berlin 2005), 34.

There are a number of other Roman legal texts associated with *remissio mercedis*, see D.19.2.25.6 (Gaius 10 ad Ed. Prov.), D.19.2.13.7 (Ulpian. 32 ad Ed.); D.19.2.30 pr (Alfen. 3 Dig. a

> D.19.2.15.2 (Ulpian. 32 ad Ed.)[76] Si vis tempestatis calamitosae contigerit, an locator conductori aliquid praestare debeat videamus. Servius omnem vim cui resisti non potest dominum colono praestare debere ait, ut puta fluminum, graculorum, sturnorum, et si quid simile acciderit, aut si incursus hostium fiat: si qua tamen vitia ex ipsa re oriantur, haec damno coloni esse, veluti si vinum coacuerit, si raucis aut herbis segetes corruptae sint. Sed et si labes facta sit omnemque fructum tulerit, damnum coloni non esse, ne supra damnum seminis amissi mercedes agri praestare cogatur, sed et si uredo fructum oleae corruperit aut solis fervore non adsueto id acciderit, damnum domini futurum: si vero nihil extra consuetudinem acciderit, damnum coloni esse. Idemque dicendum, si exercitus praeteriens per lasciviam aliquid abstulerit. Sed et si ager terrae motu ita corruerit ut nusquam sit, damno domini esse: oportere enim agrum praestari conductori, ut frui possit.
>
> If forcible damage is done by a violent storm, let us consider how far the landlord is bound to indemnify the tenant. Servius holds that he is compellable to make good all forcible damage that cannot be avoided, for instance, such as results from floods, jackdaws, starlings, &c., or from hostile inroads; but if mischief arises from the vice of the thing itself, this falls on the tenant, for instance, if his wine turns sour, or the crops are spoilt by maggots or weeds. In the same way, if a landslip takes place and carries away all the crops, the loss ought not to fall on the tenant, as he ought not to have to make good the rent of the land over and above the loss of his grain. Again, if the olives should be destroyed by blight, or the same thing should result form an exceptionally hot season, the owner must suffer, but if the mischief should be nothing beyond the common, the loss falls upon the tenant. A similar rule holds, in case troups passing along should wantonly carry something off. Again, if the land should be so shaken up by an earthquake as practically to disappear altogether, the owner must bear the loss; the rule being that the land must be made over to the tenant so that he can get the benefit of it. [Monro translation]

The text should be read together with D.19.2.15.1 which precedes it. There, Ulpian observes that there are two main grounds for the *actio conducti*, namely inability to provide *frui* of the property generally and more specifically a contravention of a provision in the *lex*.[77] The wording *praestare frui licere* echoes the *condemnatio pecuniaria* in the *formula* of the action.[78] Owing to the continuous nature of consent from which (to use modern

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Paul. Epit.), D.19.2.15.4–5 (Ulpian. 32 ad Ed.); C.4.65.8 (a. 231), 18 (a. 290), 19 (a. 293). These will be discussed further down.

[76] This text, which originally formed part of Ulpian's commentary on the edictal *formula* of the *actio conducti*, has undergone some modification. There is evidence that the citation to Servius is not first-hand, but has been taken from an intermediate source (Pomponius), see Cardilli, *L'Obbligazione di 'praestare'*, 233–234; Müller, *Gefahrtragung*, 21–22 and most recently Capogrossi Colognesi, *Remissio mercedis*, 43.

[77] See also D.19.2.15.3 (Ulpian. 32 ad Ed.)

[78] Müller, *Gefahrtragung*, 24.

terminology) all rights and duties in the contract are derived, the *locator* had a continuous obligation *praestare frui licere* towards the *conductor* in respect of the *ager*.[79] In D.19.2.15.2 Ulpian builds on this statement by investigating legal responsibility in cases where *frui* could not be provided through no fault of the parties. The broad principle laid down by Servius in this text is that the *locator* is responsible for *vis cui resisti non potest* and the *conductor* for *vitia ex ipsa re*.[80] The "risk" described here is a financial one. Where an event was judged to be an example of *vis*, the effect of this was to relieve the *conductor* in part from his obligation to pay the rent.[81] Thus, the *locator* bore the risk in the sense that he received a reduced amount of rent. Similarly, where an event was judged to be an example of *vitium*, the *conductor* bore the risk in the sense that he had to absorb the financial loss while at the same time remaining under an obligation to pay the full rent due. It is clear that remission of rent was not a panacea to all of a tenant's financial woes. Even where an event was judged to be *vis* and the *locator* bore the risk, the *conductor* still had to bear the loss of the seed as is made clear in D.19.2.15.7 (Ulpian. 32 ad Ed.).[82]

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[79] Cardilli, *L'Obbligazione di 'praestare'*, 233–257; Johne, *Die Kolonen*, 217–228.

[80] On the economic motivation for such a division of risk, see Kehoe, *Law and the Rural Economy*, 1109–119, esp. 110. See also Erdkamp, P. *The Grain Market in the Roman Empire: A Social, Political and Economic Study* (Cambridge 2009), 27 and chapter 2 generally.

[81] Kehoe, *Investment*, 221. See also D.19.2.25.6 (Gaius 10 ad Ed. Prov.). This text is not incompatible with the larger notion laid down in this text. As Müller, *Gefahrtragung*, 39–41 has shown, this text merely shows that small losses are set of against large ones whereas extraordinarily large ones caused by *vis* fall to the *locator*. On this text, see also Pinna Parpaglia, P. *Vitia ex ipsa re: aspetti della locazione in diritto romano* (Milan 1983), 61–66.

[82] Ubicumque tamen remissionis ratio habetur ex causis supra relatis, non id quod sua interest conductor consequitur, sed mercedis exonerationem pro rata: supra denique damnum seminis ad colonum pertinere declaratur.

But in all cases in which the question of abatement is taken into consideration on any of the grounds above mentioned, what the tenant gets is not full compensation for his loss, he is only relieved from payment of rent in proportion [to the falling-off in the produce]; in short what we are informed is that the tenant is to suffer something more that mere loss of seed. [Watson translation].

See also D.19.2.33 (African. 8 Quaest.), an earlier text by African in which confiscation of the property by the state as a ground for remission of rent is discussed. On this text see extensively Wacke, A. "D. 19,2,33—Afrikans Verhältnis zum Julian und die Haftung für höhere Gewalt" 1976 *ANRW* II (15), 455–496 and Ankum, H. "Afrikan Dig 19 2 33: Haftung und Gefahr bei der *publicatio* eines verpächteten oder verkauften Grundstücks" 1980 *ZSS* (rA) (97), 157–180 and extensively Pennitz, M. *Der "Enteignungsfall" im römischen Recht der Republik und des Prinzipats* (Cologne 1991).

These two concepts (*vis*/*vitium*) have caused much scholarly controversy, primarily because they are not direct equivalents and are never defined in the sources. At best it may be said that *vis* referred to events which were exceptional and which could not be resisted.[83] It has been suggested that Labeo introduced the notion of resistibility and that this separated the notion of "risk" from that of "liability" in Roman law.[84] Any event which could not be classified as *vis* was grouped together under the term *vitia*, events intrinsically connected to agricultural activity.[85] It is evident from texts such as D.19.2.15.5 (Ulpian 32 ad Ed.) that these were not closed categories. In this text, which contains an Imperial rescript of the mid-second century CE, it was decided that a poor harvest on account of the age of the vines did not constitute *vis*. It would appear from texts like D.19.2.15.3 (Ulpian. 32 ad Ed.) that content was given to the concepts of *vis* and *vitium* within the context of agricultural production. Thus, according to this text, which contains an Imperial rescript, it was only possible to claim remission of rent on account of a conflagration if it could be shown that the *conductor* had cultivated the land.

There is evidence that the grounds for remission of rent were constantly evolving. It is, for example, clear from D.19.2.15.4 (Ulpian. 32 ad Ed.) that by the mid-second century, a new notion of *ubertas* developed which was contrasted to *sterilitas*, a newly created ground for remission of rent.[86] This may go some way to explaining the list of (post-classical) examples contained in the final part of D.19.2.15.2 (*Sed et si …*).[87] One of the main problems with D.19.2.15.2 is the difficulty in matching these events to the notions of *vis* and *vitium* described earlier in the text. Some controversy remains as to whether this part of the text is a post-classical addition and it seems likely.[88] It has

83 Müller, *Gefahrtragung*, 26.

84 See D.19.2.13.7 (Ulpian 32 ad Ed.); D.19.2.27.1 (Alfen. 2 Dig.). See also Capogrossi Colognesi, *Remissio mercedis*, 37.

85 Fiori, *Locatio conductio*, 91–92. Not everyone agrees that *vitia* refers to events which fall within the sphere of agricultural cultivation, see Capogrossi Colognesi, *Remissio mercedis*, 49 for a survey.

86 Johne, *Die Kolonen*, 229–230; Kehoe, *Law and the Rural Economy*, 115–116; Capogrossi Colognesi, *Remissio mercedis*, 77. See also Corcoran, S. *The Empire of the Tetrarchs: Imperial Pronouncements 284–324* (New Edition) (Oxford 2007), 53.

87 Fiori, *Locatio conductio*, 98–111. It is possible that *sterilitas* as a ground for *remissio merecedis* was introduced later on in the second century CE, see Kehoe, *Investment*, 230 and Kehoe, *Law and the Rural Economy*, 115–116 who sees this not as a radical departure from existing principles, but merely as a refinement.

88 Müller, *Gefahrtragung*, 37–38.

therefore been suggested that the classification of events in this part of the text was no longer based on the notion of *vis* and *vitium*, but on whether the events could be classified as unusual or ordinary. It has been suggested that this division may have been based on regional custom.[89]

It remains unclear how remission of rent functioned in the context of the contract of letting and hiring. It has already been shown above in the discussion of the Dacian mining tablets that a provision for remission of rent on account of flooding could be included in the *lex*.[90] It seems safe to assume that this would also have been standard practice in these cases. The advantage of including such a provision in the contract was that if the *locator* refused (or disputed whether the event constituted *vis*), the *conductor* could use the *actio conducti* to argue contravention of the *lex*. This explains the larger context of D.19.2.15.7 (Ulpian 32 ad Ed.) which lays down the principle that a tenant could not claim full *id quod interest* when a claim was based on remission of rent as well as C.4.65.8 (231 CE) in which it was decided on appeal that a claim for remission of rent would be allowed even though it had not been expressly written into the *lex*.[91]

3.1.2. Fundus

Juristic discussion on the letting and hiring of *fundi* is more expansive when compared to those on *ager*. According to modern works on Roman law, the term *fundus* refers to "any building and any plot of land, as well as land with buildings thereon. (D.50.16.211 (Florent. 8 Inst.))."[92] Thus, the main difference between *ager* and *fundus* appears to be the presence of buildings. Buildings, especially industrial buildings situated on a *fundus* had the potential to increase the productive capacity of the property. It seems safe to assume that the rental arrangements regarding properties of this

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[89] Müller, *Gefahrtragung*, 34.

[90] There is also evidence that it occurred in tenancy of urban property for personal use where it is described as *deductio ex mercede*. On the relationship between *deductio ex mercede* and *remissio mercedis*, see Capogrossi Colognesi, L. "*Remissio mercedis* e rischi contrattuale" in *Mélanges de Droit Romain et D'Histoire Ancienne—Hommage a la Mémorie de André Magdelain* (Paris 1998), 73–89; Capogrossi Colognesi, *Remissio mercedis*, 53–62 and most recently, Sitzia, F. "D.19.2.15.2: *vis maior* e *vitia ex ipsa re*" in *Fides, Humanitas, Ius—Studi in onore di Luigi Labruna*, 8 vols. (Naples 2007), 5211–5227.

[91] This is indicative of a more general trend whereby remission of rent is seen as a general remedy, see C.4.65.18 (a. 290) and C.4.65.19 (a. 293).

[92] Berger, *Encyclopedic Dictionary*, entry on the term *fundus*. See also Buck, *Agriculture*, 12. According to Buck, the term *praedium* was sometimes used as a synonym for *fundus*. It also had an economic meaning, see De Neeve, P.W. "*Fundus* as Economic Unit" 1984 *TvR* (52-3), 3–19.

kind may have been more complex. There are a number of stock themes raised in the legal texts on the letting and hiring of a *fundus*. It is best to discuss these using the contractual process as our guide. Since no contract of agricultural tenancy has survived, modern scholars are largely reliant on the incomplete information provided by the Roman jurists.[93] As previously mentioned, (continuous) consent on the constituent parts of the reciprocal obligation at the basis of the contract was fundamental to the existence of the contract.[94]

> D.19.2.24.4 (Paul. 34 ad Ed.)[95] Colonus, si ei frui non liceat, totius quinquennii nomine statim recte aget, etsi reliquis annis dominus fundi frui patiatur: nec enim semper liberabitur dominus eo quod secundo vel tertio anno patietur fundo frui. Nam et qui expulsus a conductione in aliam se coloniam contulit, non suffecturus duabus neque ipse pensionum nomine obligatus erit et quantum per singulos annos compendii facturus erat, consequetur: sera enim est patientia fruendi, quae offertur eo tempore quo frui colonus aliis rebus illigatus non potest. …
>
> The tenant, if he is not allowed to be in possession, can very well bring an action at once in respect of the whole 5 years, even though the landowner should allow him to be in possession for the subsequent time; for the latter cannot as a matter of course get rid of his responsibility by allowing the tenant possession of the land for the second or third year. Put the case of a man who is driven out of his tenancy and betakes himself to another, not being able to afford to hold two at once; he will be quit of all liability for the rent, and has a good action to recover whatever he would have gained each successive year by keeping on in the old tenancy: as permission to take possession comes too late if it is only offered at a time when the tenant has formed other engagements and is unable to avail himself of it.
>
> [Monro translation]

This text demonstrates that where a *locator* was unable to provide *frui*, the *conductor* could withdraw and sue for breach of contract. It is clear that *frui* here referred not just to the economic exploitation of the land, but also of the building. A similar theme is raised in D.19.2.9 pr (Ulpian. 32 ad Ed.) where the *conductor* was evicted without fault.[96] This text introduces a qualifica-

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[93] Crook, *Law and Life*, 155–156.

[94] See, for example, the importance of continuous consent in the case of the renewal of the tenancy as in D.19.2.14 (Ulpian. 71 ad Ed.) and C.4.65.16 (a. 260).

[95] On this text, see Costa, *La locazione di cose*, III, § 3 and Mayer-Maly, *Locatio conductio*, 148–149.

[96] Si quis domum bona fide emptam vel fundum locaverit mihi isque sit evictus sine dolo malo culpaque eius, Pomponius ait nihilo minus eum teneri ex conducto ei qui conduxit, ut ei praestetur frui quod conduxit licere. …

If the bona fide purchaser of a house or land lets it, and the true owner recovers it without

tion, namely that the *locator* is released from liability if he could produce another equally suitable rental property, but there are doubts about the authenticity of the latter part of this text.[97]

The texts reveal little about the parties to such contracts apart from the interesting case in D.15.3.16 (Alfen. 2 Dig.) where a *fundus* (together with some oxen) was let for the purposes of cultivation to a slave using his *peculium*.[98] The mention of oxen in this text is particularly informative as it alludes to a wider point, namely that a *fundus* was customarily let out with *instrumentum*, movable property which assisted the *conductor* in realising the economic potential of the property through mixed farming.[99] D.19.2.19.2 (Ulpian. 32 ad Ed.) lists a number of items used for the production of olive oil which counted as *instrumentum*.[100] The *conductor* was liable under the normal standards of contractual liability for the *instrumentum*.[101] It must be assumed that what counted as *instrumentum* would have been dictated by the type of property and the purpose for which it had been let.[102]

A number of other matters are raised in the texts. First, since the contract of letting and hiring only conferred personal rights on the *conductor*, security of tenure in the modern sense did not exist. Nonetheless, various texts show that the *conductor* was not completely without remedy.[103] Where a *locator* alienated the rented property occupied by a *conductor* by selling it, the latter could use the *actio conducti* for breach of contract for failure to provide *frui* for the term of the contract. To counteract this possibility, it became common to include a provision in the agreement with the new

any collusion or negligence on the lessor's part, Pomponius holds that the latter is still liable to an action on the contract on the part of his lessee to compel him to procure him the power of enjoying what he hired. … [Monro translation].

[97] See on this text Mayer-Maly, *Locatio conductio*, 156. For a case where the *conductor* absconds from the property without notice, see D.19.2.55.2 (Paul. 2 Sent.).

[98] Scheidel, W. *Grundpacht und Lohnarbeit in der Landwirtschaft des römischen Italien* (Frankfurt am Main 1994), 133.

[99] Buck, *Agriculture*, 25.

[100] On this text, see Mayer-Maly, *Locatio conductio*, 121–122. See also Buck, *Agriculture*, 16, 18–20, 24. for a full list of *instrumentum fundi*. It could also include slaves. What these texts do not reveal is how the *instrumentum* were dealt with in terms of the contract (whether they were listed etc.), see Frier, B.W. "Law, Technology and Social Change: The Equipping of Italian Farm Tenancies" 1979 *ZSS* (rA) (96), 204–228.

[101] MacCormack, 1994 *Index* (22), 189–209, 198; Johne, *Die Kolonen*, 199–102.

[102] See, for example, D.43.24.15.1 (Ulpian. 71 ad Ed.) where a *fundus* had been rented out for the purpose of extracting rock. See also D.19.2.3 (Papin. 3 Sab.)

[103] D.19.2.25.1 (Gaius 10 ad Ed. Prov.); D.19.2.54.1 (Paul. 5 Resp.) and C.4.65.9 (a. 234). And on this topic, see extensively Zimmermann, *Obligations*, 378–380; Kehoe, *Law and the Rural Economy*, 123–128.

owner not to evict the tenants. If such a provision was contravened and the *conductor* sued his former *locator* for breach of contract, the latter could recover his loss from the new owner based on the contravention of the agreement not to evict the tenant. In second place, the issue of subletting also appears:

> D.19.2.24.1 (Paul. 34 ad Ed.). Si colonus locaverit fundum, res posterioris conductoris domino non obligantur: sed fructus in causa pignoris manent, quemadmodum essent, si primus colonus eos percepisset.
>
> If a tenant sublets the land, things which are the property of the sub-lessee do not form part of the head landlord's security; but the produce still is subject to lien, just as would be the case if the middleman had gathered it himself. [Monro translation]

Since contracts for the letting and hiring of a *fundus* had an economic purpose, subletting would have been permissible, but as this text shows, the property of the secondary tenant was not obliged to the *locator*, even though the standing crops were. The reason for this deviation in the case of the standing crops must refer to the underlying principle of *accessio* and the fact that they were the most valuable part of the *fundus* in economic terms.

As far as pledges are concerned, the texts do not yield much information. D.47.2.62.8 (African. 8 Quaest.)[104] shows that it was customary to agree that the standing crops would be pledged as security for the payment of rent, while C.4.65.5 (a. 223) shows that apart from standing crops, individual items of movable property could also be pledged with the consent of the landlord.[105]

The issue of *remissio mercedis* also appears in two texts related to the letting and hiring of a *fundus*. This is important, since it shows that the concept was not limited to catastrophe befalling land per se. It could also include (industrial) buildings forming part of the land.[106] D.50.8.3.2 (Ulpian. 3 Opin.) shows the importance of good faith as a criterion for assessing the

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104 Locavi tibi fundum, et (ut adsolet) convenit, uti fructus ob mercedem pigori mihi essent. ...

I let you some land and (as is customary) it was agreed that its produce would be in pledge to me in respect of the rent. [Watson translation].

105 Certi iuris est ea, quae voluntate dominorum coloni in fundum conductum induxerint, pignoris iure dominis praediorum teneri. Quando autem domus locatur, non est necessaria in rebus inductis vel illatis scientia domini: nam ea quoque pignoris iure tenentur.

The law is certain that landlords have a lien on things which tenants bring into the rented farm with the consent of the former. Moreover, when a house is let, such knowledge of the owner of things brought into it, is not necessary; the landlord has a lien also on such property. [Blume translation].

106 See C.4.65.12 (a. 245) for a case of damage caused by attack of robbers.

terms of a contract where a provision exists in relation to remission of rent.[107] Finally, D.19.2.33 (Alfen. 8 Quaest.) establishes the principle that where *vis* causes *frui* to be impossible the *locator* will only be liable to the extent that the tenant could not enjoy the property.[108]

3.1.3. Praedium

Of all the terms used to describe immovable property in a rural setting, *praedium* is the most vague. Berger defines *praedia* as "plots of land (estates) together with building erected on them."[109] Such a definition does not differ greatly from the one given to *fundus* and it demonstrates the generic nature of the term (property). It is therefore difficult to create stock examples for *praedia* in the context of letting and hiring. In D.43.24.15.1 (Ulpian 71 ad Ed.)[110] Labeo/Ulpian mentions a *praedium* which had been let out for the purpose of extracting stone, while D.5.3.27.1 (Ulpian 15 ad Ed.)[111] mentions a *praedium* with a brothel which had been rented out.

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[107] Sed et si in locatione fundorum pro sterilitate temporis boni viri arbitratu in solvenda pensione cuiusque anni pacto comprehensum est, explorata lege conductionis fides bona sequenda est.

But if in the renting out of property there is in the agreement some provision for a season of blight in relation to the making of payment for each year, at the discretion of an upright arbitrator, good faith is to be observed once the terms of the contract have been investigated. [Watson translation]. And on this text see extensively Trisciuoglio, A. "'*Bona fides*' e locazione pubbliche nelle 'Opiniones' di Ulpiano" in *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea* IV (Padova 2003), 313–330. See also C.4.65.8 (a. 231), 9 (234), 19 (a. 293).

[108] This text has been discussed extensively, see see Costa, *La locazione di cose*, III, §§ 6–8; Knütel, 1983 *ZSS* (rA) (100), 340–443, 405–407; Vacca, *Considerazioni*, 259–265; Vacca, *Buona fede*, 141; Vacca, *Profili*, 129–135; Vacca, L. "Sulla rilevanza dei 'precedenti' nel diritto giurisprudenziale romano" in *Mélanges Felix Wubbe* (Liege 1999), 493–515, 509–515 as well as Honsell, *Quod Interest*, 122–128. See also C.4.65.15 (a. 259).

[109] Berger, *Encyclopedic Dictionary*, entry on the term *praedium*. What sets *praedium* apart from *fundus* is that three variations on the term *praedium* occur in Latin. The first, *praedium rusticum* refers to "landed property situated on the outside of cities and exploited for agriculture. Synonyms for this term include *fundus*, *ager*, *locus*." The second, *praedium urbanum* refers to "buildings, even when located in the country. Synonyms include *aedes* and *aedificium*." The final, *praedium suburbanum* is "a plot of land located in the vicinity of a city." The range of possible economic exploitation seems to have dictated whether it qualified as urban (*praedium urbanum*) or rural land (*praedium rusticum*).

[110] Is qui fundum pastinandum locaveras, lapides sustulerit et in vicini proiecit praeium. …

Someone to whom you had rented a farm for digging and leveling took out the stones and threw them onto the neighbor's lands … [Watson translation].

[111] Sed et pensiones, quae ex locationibus praediorum urbanorum perceptae sunt, venient, licet a lupanario perceptae sint: nam et in multorum honestorum virorum praediis lupanaria exercentur.

Again, rents received rom the lettings of urban property will come under the claim, even

Apart from these, legal texts mention aspects of the letting and hiring of *praedia rustica*. These include the nomenclature used to identify properties such as the upper and lower Seian property in D.31.86.1 (Paul. 13 Resp.) and the Cornelian property in D.26.7.46 pr (Paul. 9 Resp.). Other issues mentioned are the implied hypothecation of standing crops:

> D.20.2.7 pr (Pompon. 13 Lect.) In praediis rusticis fructus qui ibi nascuntur tacite intelleguntur pignori esse domino fundi locati, etiamsi nominatim id non convenerit.
>
> As regards rural land the crops are impliedly taken to be hypothecated to the owner of the land, even if not agreed in so many words.
> [Watson translation]

> C.4.65.5 (a. 223) Certi iuris est ea, quae voluntate dominorum coloni in fundum conductum induxerint, pignoris iure dominis praediorum teneri. ...
>
> The law is certain that landlords have a lien on the things which tenants bring onto a rented farm with the consent of the former. ... [Blume translation]

Other issues raised in the texts include the collection of annual rents in instalments in D.40.7.40.5 (Scaev. 24 Dig.), the interpretation of a provision in the contract which forbade the tenant from having a fire in D.19.2.9.3 (Ulpian 32 ad Ed.)[112] and the tacit renewal of a contract in D.19.2.13.11 (Ulpian. 32 ad Ed.).[113]

There are only two legal texts which mention *praedia urbana* explicitly. These are D.12.6.55 (Papin. 6 Quaest.) where a usurper lets out *praedia* unlawfully and D.19.2.30 pr (Alfen. 3 Dig. Paul. Epit.) concerning the subletting of an apartment within an *insula* which will be discussed below.

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if they have been received from a brothel. For brothels are run even on the property of many respectable men. [Watson translation].

[112] Si colonis praediorum lege locationis ut innocentem ignem habeant denuntiatum sit, si quidem fortuitus casus incendii causam intulerit, non praestabit periculum locator: si vero culpa locatoris, quam praestare necesse est, damnum fecerit, tenebitur.

If tenants of land are required by the terms of the lease to keep fire innocuous, then, if a conflagration occurs from some accidental cause, the lessor will not be held responsible; but if the cause is the lessor's own negligence which he is bound to make good, he will be liable. [Monro translation].

[113] Qui impleto tempore conductionis remansit in conductione non solum reconduxisse videbitur, sed etiam pignora videntur durare obligata. ...

If a tenant holds over on the expiration of the period of his lease, he is deemed to have contracted a fresh lease, and not only so, but if any security was given, it is still good. [Monro translation].

3.1.4. Villa

According to Berger, the term refers to "a country estate, a country house. *Villa urbana* is the term used to refer to the residential part of a country establishment; *villa rustica* referred to farm buildings, quarters for slaves working in the agricultural part of the estate."[114] Roman legal sources reflect the composite nature of this type of immovable property.[115] The *villa rustica* is mentioned in a single text:

> D.19.2.25.3 (Gaius 10 ad Ed. Prov.) Conductor omnia secundum legem conductionis facere debet. Et ante omnia colonus curare debet, ut opera rustica suo quoque tempore faciat, ne intempestiva cultura deteriorem fundum faceret. Praeterea villarum curam agere debet ut eas incorruptas habeat.
>
> A *conductor* is bound to carry out the terms of his contract in every respect, and above all things a farmer is bound to take care that he performs the regular agricultural operations at the proper time of year, so as not to damage the land by unseasonable cultivation. Besides this, he must look after the farm-buildings and take care to keep them in good repair.
>
> [Monro translation]

This texts shows the interconnected nature of the *fundus* and its buildings. It also demonstrates the principle that the *conductor* must observe all aspects of the *lex contractus*. In the case of the *villa rustica*, this entailed the careful cultivation of the property and the maintaining of buildings. A single text mentions the *villa urbana* in the context of letting and hiring:

> D.19.2.11.4 (Ulpian. 32 ad Ed.) Inter conductorem et locatorem convenerat ne in villa urbana faenum componeretur: composuit: deinde servus igne illato succendit. Ait Labeo teneri conductorem ex locato, quia ipse causam praebuit inferendo contra conductionem.
>
> Lessor and lessee agreed that hay should not be stacked in residential parts of the property; nevertheless the lessee did so stack hay, and a slave set fire to it. Labeo holds that the lessee is liable on the contract of lease, because the fire was the result of his own fault in stacking contrary to the contract.
>
> [Monro translation]

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[114] Berger, *Encyclopedic Dictionary*, entry on the term *villa*. See also Buck, *Agriculture*, 13. See also Jones, *Bankers*, 223 for a discussion of the villa of the Sestii at Settefinestre.

[115] See Purcell, N. "The Roman *villa* and the landscape of production" in *Urban Society in Roman Italy* (London 2003), 151–180 as well as Marzano, A. *Roman Villas in Central Italy: A Social and Economic Study* (Leiden 2007) and Smith, J.T. *Roman Villas—a Study in Social Structure* (London 1997) generally.

The case presented by Ulpian is a clear breach of the *lex*. The parties had agreed that hay should not be stacked inside a *villa urbana*. The *conductor* acted in contravention of this provision with catastrophic results brought about not by him, but by his slaves. Ulpian, drawing on the authority of Labeo held the *conductor* liable *ex locato* for *id quod interest*. There is no mention of *culpa* in the text. According to Frier, such a reference would be superfluous given the clear breach of contract presented in this case.[116] Thomas has noted that that the final clause (*quia ... conductionem.*) is strictly unnecessary and this has led him to surmise that the text in its original form may have contained a more expansive discussion of Aquilian liability which is known to have undergone some development during the time of Labeo.[117] A further point identified by Thomas is that the text does not mention noxal liability for the damage caused by the slave. In his view, this was deliberate as Ulpian wished to focus on the contractual responsibility of the *conductor*.[118]

3.2. *Other Categories of Immovable Property in a Rural Setting*

Roman legal texts mention a number of other categories of property in a rural setting which could be rented out, usually for an economic purpose. On the whole, references to such properties are fairly brief and do not permit more comprehensive conclusions to be drawn. These include the renting of a woodland pasture (*saltus*) mentioned in D.19.2.19.1 (Ulpian. 32 ad Ed.)[119] and of a lake (*lacus*) in D.43.14.1.7 (Ulpian 68 ad Ed.). D.19.2.29 (Alfen. 7 Dig.) mentions a provision of a contract for the renting of woodland (*silva*).[120]

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116 Frier, 1978 *ZSS* (rA) (95), 232–269.

117 Thomas, 1978 *Acta Juridica*, 127–155, 128. It is in this context that one must also take note of D.19.2.30.4 (Alfen. 3 Dig. a Paulo Epit.) where a slave burned down a *villa* deliberately (*non fortuito casu*). On this text see Cardilli, *L'Obbligazione di 'praestare'*, 257–261. According to Thomas 1978 *Acta Juridica*, 127–155, 129, 151 and Frier, 1978 *ZSS* (rA) (95), 232–269, 249–253 this text represents the earliest example of vicarious liability for the actions of slaves.

118 An analogous situation is described in D.9.2.27.11 (Ulpian. 18 ad Ed.) where Proculus notes that the conductor of a *villa* only has the privilege of handing over slaves who have caused loss in terms of noxal liability if he was free of fault, Thomas 1978 *Acta Juridica*, 127–155, 129. To this may be added D.9.2.27.9 (Ulpian. 18 ad Ed.) where it is established that the *conductor* will be liable for the loss caused by his slaves if he was negligent in choosing them Knütel, 1983 *ZSS* (rA) (100), 340–443, 392; MacCormack, 1971 *RIDA* (18), 525–551, 536–539.

119 On this text, see Frier, 1978 *ZSS* (rA) (95), 232–269, 244; Fiori, *Locatio conductio*, 105–108; Buck *Agriculture*, 15.

120 MacCormack, 1994 *Index* (22), 189–209, 194–195; Fiori, *Locatio conductio*, 88–90, See also D.19.2.25.4 (Gaius 10 ad Ed. Prov.). On the status of foresters, see Buck, *Agriculture*, 30–31.

One final term that requires mention in this context is *locus* which is "... distinguished from *fundus* as a part of the whole. Both urban and rural lands are called *locus*. A plot of land in the city with no building on it is called an *arca*, in the country an *ager*."[121] There are three legal text which mention *loci* in the context of letting and hiring. According to D.9.3.5.3 (Ulpian. 23 ad Ed.) the person who hires a *locus* is liable for the actions of those (such as his students) who throw items or pour liquids from the windows.[122] D.19.2.19.4 (Ulpian. 32 ad Ed.)[123] deals with alterations made by a tenant and D.20.2.3 (Ulpian. 73 ad Ed.)[124] with the implied hypothecation of goods brought into a *locus*.

3.3. *Immovable Property in an Urban Setting*

The majority of Roman legal texts on letting and hiring of property in an urban setting are concerned with tenement buildings (*insulae*) and apartments (*cenaculi*).[125] Given the commercial focus of the contract, letting and

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121 Berger, *Encyclopedic Dictionary*, entry on the term *locus*. A synonym for this term is *area*.

122 Si horrearius aliquid deiecerit vel effuderit aut conductor apothecae vel qui in hoc dumtaxat conductum locum habebat, ut ibi opus faciat vel doceat, in factum actioni locus est, etiam si quis operantium deiecerit vel effuderit vel si quis discentium.

If a warehouseman or a hirer of a storeroom or a place to do some work or to teach his pupils should throw something down or pour something out an actio in factum will lie, even if it was one of his workmen or one of his pupils who did the throwing or pouring. [Watson translation].

123 Si inquilinus ostium vel quaedam alia aedificio adiecerit, quae actio locum habeat? Et est verius quod Labeo scripsit competere ex conducto actionem ut ei tollere liceat, sic tamen, ut damni infecti caveat, ne in aliquo dum aufert deteriorem causam aedium faciat, sed ut pristinam faciem aedibus reddat.

If the tenant of a house makes an entrance or other additional structure to a building, what action will he have in respect of it? The better opinion is that of Labeo, viz. that he has a good action on his contract for freedom to remove, provided always he furnishes security against contingent damage, so as to prevent him, in effecting the removal, from making the house dangerous to live in, and to make it sure that he will restore its previous form. [Monro translation].

124 Si horreum fuit conductum vel devorsorium vel area, tacitam conventionem de invectis illatis etiam in his locum habere putat Neratius: quod verius est.

If a warehouse, hotel, or site is leased, Neratius thinks that there is here also an implied agreement for the hypothecation of goods brought in. This is the better view. [Watson translation].

125 This may reflect the increasing urbanisation of the Roman Empire from the second century CE onwards, see De Neeve, *Colonus*, 128. The following is based on Du Plessis, P.J. "Janus in the Roman law of Urban Lease" 2006 *Historia* (55-1), 48–63.

hiring of urban property is mainly discussed from an economic perspective.[126] Frier, in his comprehensive study of this area of law, has demonstrated that the urban rental market, although higher in risk owing to the nature of Roman construction and the preponderance of conflagration, was more profitable than agricultural tenancy.[127] Tenement buildings could be utilised in one of two ways. Spaces for unspecified economic activity (*meritoria*) could be rented out or the tenement could be divided into self-contained apartments (*cenaculi*) which could be rented out to wealthier tenants.[128] There were two main ways in which these buildings could be managed, namely either within the *familia* by using a slave building manager (*vilicus*) and attendants (*insularii*) or by renting the entire building to a contractual middleman who (using his own staff or the staff which came with the *insula*) then sublet individual spaces for profit.[129] Little is known about the conventions which governed such contracts as no example has been preserved.

The conventional notions of liability (*dolus* and *culpa*) applied to contracts for the renting of urban property and the standard contractual remedies (*actiones locati et conducti*) could be employed to recover *id quod interest* where breach of contract had occurred owing to fault.[130] Apart from these, Roman law also developed other remedies specifically tailored to suit an urban context. As a general rule, a *locator* could terminate the contract and expel the *conductor* at will, but in the case of urban property the Roman jurists distinguished between justified and unjustified expulsion. In both cases, the *conductor* could sue *ex conducto*, but the *quantum* of the claim depended on whether the expulsion could be justified.[131] The corresponding remedy available to the *conductor* was justified abandonment of

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126 The term *inquilinus* is commonly used to describe tenants of property in an urban location. Where urban spaces were rented for personal habitation, the term *habitare* occurs in Roman legal texts.

127 Frier, *Landlords and Tenants*, 21–22. But for an opposing view, see Rosenstein, N. “Aristocrats and Agriculture—the Middle and Late Republic” 2008 *JRS* (98), 1–26.

128 Frier, *Landlords and Tenants*, 27–28.

129 Frier, *Landlords and Tenants*, 24, 28–30. Frier, B.W. “The Rental Market in Early Imperial Rome” 1977 *JRS* (67), 27–37. See D.19.2.30 pr (Alfen. 3 Dig. a Paulo Epit.); D.19.2.7 (Paul. 32 ad Ed.); D.19.2.8 (Tryph. 9 Disp.). On the complexity of collecting rent, see D.13.7.11.5 (Ulpian. 28 ad Ed.) and D.12.6.55 (Papin. 9 Resp.).

130 Frier, *Landlords and Tenants*, 135–137. The rules of vicarious liability also applied, see Frier, *Landlord and Tenants*, 146 where the author explains the stages in the development of the classical doctrine of vicarious liability.

131 Johne, *Die Kolonen*, 217–226; Frier, *Landlords and Tenants*, 70–71, 83.

the property (*migratio ex iusta causa*).[132] While the effect of expulsion and abandonment was to terminate the contract, a less invasive remedy was available to the *conductor* namely *deductio ex mercede* (reduction of rent) which enabled the tenant to reduce the rent in proportion to a diminution in use and enjoyment.[133]

One aspect of letting and hiring of urban property in Roman law that is often overlooked is the fact that alongside the traditional remedies available in terms of the contract, certain public order remedies were also available in terms of the jurisdiction of the *Praefectus Vigilum*, an office created under Augustus to deal with the administration of Rome.[134] It is well documented that the Prefect of the Watch had jurisdiction over a number of matters related to letting and hiring such as rental disputes, the entering of a warehouse to extract *invecta et illata* on account of non-payment and even the chastisement of thieving bath attendants.[135] There are a number of texts by the jurist Paul in which he mentions aspects of this jurisdiction. Take the following:

> D.1.15.3.1 (Paul. 1 De Off. Praef. Vig.) Cognoscit praefectus vigilum de incendiariis effractoribus furibus raptoribus receptatoribus, nisi si qua tam atrox tamque famosa persona sit, ut praefecto urbi remittatur. Et quia plerumque incendia culpa fiunt inhabitantium, aut fustibus castigat eos qui neglegentius ignem habuerunt, aut severa interlocutione comminatus fustium castigationem remittit.
>
> The prefect of the city guard tries cases of arsonists, burglars, thieves, robbers, and resetters except if it happens that the offender is so vicious and notorious that his case is remitted to the prefect of the city. Because very often houses go on fire through the negligence of their occupiers, he either chastises by beating those who have kept their fire too carelessly, or he gives them a severe dressing down and warning them lets them off the beating.
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> [Watson translation]

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132 Frier, *Landlords and Tenants*, 92–104. On the pledges commonly employed to secure payment of rent, see Frier, *Landlord and Tenants*, 105–135. See on this also Amaya Calero, M. "*Ius Controversum* sobre la prioridad hipotecaria en la *locatio-conductio*" 2000 *IVRA* (51), 29–45; Du Plessis, P.J. "The *Interdictum de migrando* Revisited" 2007 *RIDA* (54), 219–244 as well as Murga, J. "La *perclusio locatoris* como *vis privata legitima*" 1987 *RIDA* (34), 229–264.

133 The doctrinal foundation of this remedy remains controversial, see Frier, B.W. "Law, economics and disasters down on the farm: *remissio mercedis* revisited" 1989–1990 *BIDR* (31–32), 237–270, 239–251. For an alternative construction see Du Plessis, P.J. "A new Argument for *Deductio ex Mercede*" in *Ex Iusta Causa Traditum: Essays in Honour of Eric H. Pool* (Pretoria 2005), 69–80. For a discussion of the conceptual relationship between *deductio ex mercede* and *remissio mercedis*, see Capogrossi Colognesi, *Remissio mercedis*, 53–62.

134 On this, see the definitive article by Schiller, A.A. "The Jurists and the Prefects of Rome" 1949 *RIDA* (3), 319–359.

135 Schiller, 1949 *RIDA* (3), 319–359, 325–332.

This official had both the right to beat occupiers of an *insula* whose careless keeping of a fire caused a conflagration and to let them off with a stern warning instead of a beating (see also D.1.15.4 (Ulpian. 1 De Off. Praef. Vig.)).[136] His jurisdiction also extended to related matters affecting the contract of letting and hiring. D.1.15.3.2 (Paul. 1 De Off. Praef. Vig.)[137] mentions that he could hold an inquest where an *insula* or *horreum* has been burgled, while D.1.15.3.5 (Paul. 1 De Off. Praef. Vig.)[138] shows that the *Praefectus Vigilum* could hold a hearing where bath attendants who could be rented to look after bathers' belongings were accused of theft. Notice also that more serious cases were referred to the *Praefectus Urbi*.

3.3.1. Cenaculum

Roman legal texts do not reveal much information on the renting of apartments within tenement buildings. The small number of texts in which it is mentioned are mainly concerned with three topics. D.19.2.25.2 (Gaius 10 ad Ed. Prov.)[139] discusses a case where a tenant is entitled to terminate the

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[136] Imperatores Severus et Antoninus Iunio Rufino praefecto vigilum ita rescripserunt: "insularios et eos, qui neglegenter ignes apud se habuerint, potes fustibus vel flagellis caedi iubere: eos autem, qui dolo fecisse incendium convincentur, ad Fabium Cilonem praefectum urbi amicum nostrum remittes: fugitivos conquirere eosque dominis reddere debes."

The Emperors Severus and Antoninus issued rescripts to Junius Rufinus, prefect of the city guard, in the following terms: "You can also order to be beaten with sticks or flogged those flat-dwellers who have kept their house-fires carelessly. But those who are convicted of willful and malicious arson, you shall remit them to our friend, Fabius Cilo, prefect of the city. You ought to hunt down fugitive slaves and return them to their masters." [Watson translation].

[137] Effracturae fiunt plerumque in insulis in horreisque, ubi homines pretiosissimam partem fortunarum suarum reponunt, cum vel cella effringitur vel armarium vel arca: et custodes plerumque puniuntur, et ita divus Antoninus Erucio claro rescripsit. Ait enim posse eum horreis effractis quaestionem habere de servis custodibus, licet in illis ipsius imperatoris portio esset.

Housebreakings happen mostly in tenement blocks or in the warehouses where people store the most precious part of their fortunes; a store-chamber or a cupboard or a chest gets broken into. The custodians are very often punishable, just as indeed the deified Antoninus stated in a rescript to Erucius Clarus. For he said that Erucius could, when warehouses were burgled, hold an inquest concerning the slaves who were on guard, even though the emperor himself should have a part share in them. [Watson translation].

[138] Adversus capsarios quoque, qui mercede servanda in balineis vestimenta suscipiunt, iudex est constitutus, ut, si quid in servandis vestimentis fraudulenter admiserint, ipse cognoscat.

As against the capsarii also, who engage for hire to look after people's clothes at the baths, he has been set up as a judge with authority himself to hold a hearing if they should have dealt fraudulently in looking after the clothes. [Watson translation].

[139] Si vicino aedificante obscurentur lumina cenaculi, teneri locatorem inquilino: certe quin liceat colono vel inquilino relinquere conductionem, nulla dubatio est. ...

If a room is let and the neighbour builds out the light, the law is that the lessor is liable to the tenant, ... [Monro translation].

contract by abandoning the property *ex iusta causa* (a neighbouring building subsequently erected obscures all the light in the apartment or for want of necessary repairs by the owner of the tenement). D.13.7.11.5 (Ulpian 28 ad Ed.), which will be addressed more fully below, deals with the complex situation where rooms have been sublet and whether the goods of the secondary tenant are deemed to be pledged for the debt (rent owed) of the primary tenant. The third issue which crops up in a number of texts is the quasi-delictual liability of the *conductor* for things being thrown or poured out of the windows of an apartment either by him or his slaves/children-in power. D.44.7.5.5 (Gaius 3 Res Quot.)[140] lays down the principle of strict liability for such cases. Two further texts discuss variations on this theme. D.9.3.1.7 (Ulpian 23 ad Ed.)[141] examines the case where a son-in-power had rented an apartment using his *peculium*. The question posed is whether the father or the son will be liable quasi-delictually for things thrown or poured out from the windows of an apartment, while D.9.3.5.1 (Ulpian 23 ad Ed.)[142] examines cases where a section of an apartment has been granted in use to third parties or sublet and the effect which these arrangements may have on the quasi-delictual liability of the *conductor* for things thrown or poured out.

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[140] Is quoque ex cuius cenaculo (vel proprio ipsius vel conducto vel in quo gratis habitabat) deiectum effusumve aliquid est ita, ut alicui noceret, quasi ex maleficio teneri videtur: …

Also a person from whose upper floor (whether it is his own or a hired place or even one in which he is living rent free) something has been thrown or poured down with the result that it caused harm to another is regarded as liable in quasi-delict. … [Watson translation].

[141] Si filius familias cenaculum conductum habuit et inde deiectum vel effusum quid sit, de peculio in patrem non datur, quia non ex contractu venit: in ipsum itaque filium haec actio competit.

If a son-in-power has hired an upper room and something is thrown or poured out from there, an action on his peculium is not granted against the head of the family because the claim does not arise from the contract of hire. The action, therefore, lies against the son himself. [Watson translation].

[142] Si quis gratuitas habitationes dederit libertis et clientibus vel suis vel uxoris, ipsum eorum nomine teneri Trebatius ait: quod verum est. Idem erit dicendum et si quis amicis suis modica hospitiola distribuerit. Nam et si quis cenaculariam exercens ipse maximam partem cenaculi habeat, solus tenebitur: sed si quis cenaculariam exercens modicum sibi hospitium retinuerit, residuum locaverit pluribus, omnes tenebuntur quasi in hoc cenaculo habitantes, unde deiectum effusumve est.

If someone gives free accommodation to his own or his wife's freedmen and clients, Trebatius says he is liable in his own name, and this is true. The same must also be said in the case of someone who gives hospitality to his friends on a modest scale; for if, although he lets out lodgings, he occupies most of the house himself, he alone will be liable; but if a lodging house keeper retains only a small part for himself and lets out the rest to a large number of people, all those who live in that house will be liable as occupiers for whatever is thrown down or poured out. [Watson translation].

3.3.2. Insula

Tenement buildings (*insulae*) consisted both of commercial and residential spaces.[143] Management of the tenement was either entrusted to a *vilicus* and his attendants or to a contractual middleman (using his own staff) who sublet spaces for profit.[144] Although commercial spaces are known to have formed part of tenement buildings, they are largely absent from the discussion in Roman legal sources of the legal complexities of renting spaces in an *insula*. The reasons for this are not clear. Most likely it reflects the Roman jurists' perspective on the urban property investment. It is best to let the texts speak for themselves. D.19.2.9.1 (Ulpian 32 ad Ed.)[145] shows the continuous nature of the reciprocal obligation at the heart of the contract of letting and hiring. The tenant was only liable for the rent in proportion to the amount of use and enjoyment received. D.19.2.35 pr (African. 8 Quaest.)[146] shows that the *conductor* was legally entitled to terminate the contract and to abandon the property if the *locator*, by doing repairs in such a way, rendered the apartment uninhabitable.[147] According to Africanus, the necessity of the repairs dictated the *quantum* of the tenant's claim (compare D.19.2.9.6 (Ulpian 32 ad Ed.)[148] where a *conductor* had paid in advance and

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143 See Delaine, J. "The *insula* of the Paintings at Ostia i.4.2–4: Paradigm for a city in flux" in *Urban Society in Roman Italy* (Cambridge 2003), 79–106.

144 See D.19.2.30 pr (Alfen. 3 Dig. a Paulo Epit.); D.19.2.7 (Paul. 32 ad Ed.); D.19.2.8 (Tryph. 9 Disp.). On the complexity of collecting rent, see D.13.7.11.5 (Ulpian. 28 ad Ed.) and D.12.6.55 (Papin. 9 Resp.).

145 Hic subiungi potest, quod Marcellus libro sexto digestorum scripsit: si fructuarius locaverit fundum in quinquennium et decesserit, heredem eius non teneri, ut frui praestet, non magis quam insula exusta teneretur locator conductori. Sed an ex locato teneatur conductor, ut pro rata temporis quo fruitus est pensionem praestet, ...

To this may be added the following opinion of Marcellus (Dig. lib. VI.). "If a usufructuary lets land for 5 years and dies, his heres is not compellable to procure the lessee enjoyment, any more than a lessor would be liable to his lessee if a block which he had leased should be burnt down." However, ... [Watson translation].

146 Et haec distinctio convenit illi, quae a Servio introducta et ab omnibus fere probata est, ut, si aversione insulam locatam dominus reficiendo, ne ea conductor frui possit, effecerit, animadvertatur, necessario necne id opus demolitus est: ....

The above distinction is quite in keeping with one first made by Servius, and generally approved since, namely the following. A man lets a block of chambers, per aversionem, and then effects repairs in such a way that the lessee cannot make use of the property; the point to consider is whether the act of demolition was necessary or not: ... [Monro translation]. See also Jakab, *Risikomanagement*, 251–252.

147 Capogrossi Colognesi, *Remissio mercedis*, 24–27.

148 Si alienam domum mihi locaveris eaque mihi legata vel donata sit, non teneri me tibi ex locato ob pensionem: sed de tempore praeterito videamus, si quid ante legati diem pensionis debetur: et puto solvendum:

If you let me a house which belongs to a third party, and I acquire the ownership by legacy

the tenement collapses before the rental period has ended). Similarly, C.4.65.3 (a. 214)[149] demonstrates a mirror image of the same remedy which operated to the benefit of the *locator*. Under certain circumstances described in this text, the *locator* could terminate the contract unilaterally and evict the tenant.

Since the practice whereby an entrepreneur rented the entire *insula* and sublet spaces for profit is frequently discussed in Roman legal texts, it must be examined in greater detail.[150] For all its apparent simplicity, subletting of urban property in Roman law is an unusual subject and has not attracted much academic attention.[151] There are at least three parties involved in this scenario: the owner, the primary tenant (contractual middleman) and the secondary tenant(s). Several texts in Roman legal sources deal with this form of urban subletting. In nearly all of these, the issue of subletting functions as part of a larger discussion about the extent of specific contractual claims.

This arrangement involved the use of contractual middlemen, usually freedmen, as primary tenants.[152] The primary tenant/middleman in the Roman law of urban tenancy has received some attention in modern scholarship. Frier has demonstrated, using evidence from Cicero's letters to Atticus,

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or donation, you cannot sue me on the contract of rent. [This applies to rent which falls due subsequently,] with regard to the previous period, and any rent which became due before the testator's death, [or the date of the donation,] this is a point to consider, but my opinion is that it must be paid. [Monro translation].

149 Diaetae, quam te conductam habere dicis, si pensionem domino insulae solvis, invitum te expelli non oportet, nisi propriis usibus dominus esse necessariam eam probaverit aut corrigere domum maluerit aut tu male in re locata versatus es.

You should not be expelled, against your will, from the room which you say you hired, if you pay the rent to the owner of the apartment house, unless such owner proves that it is necessary for his own use, or that he wants to improve it, or that you conducted yourself badly in the rented room. [Blume translation].

150 This form of property management is discussed in the following sources: D.13.7.11.5 (Ulpian. 28 ad Ed.); D.19.1.53 pr (Lab. 1 Pith.); D.19.2.7 (Paul. 32 ad Ed.); D.19.2.8 (tryph. 9 Disp.); D.19.2.30 pr (Alfen. 3 Dig. a Paulo Epit.); D.19.2.35 pr (African. 8 Quaest.); D.19.2.58 pr (Lab. 5 Post. a Iavoleno Epit.); D.19.2.60 pr (Lab. 4 Post. a Iavoleno Epit.). See also, amongst others, Cicero, *Att.*15, 17, 1.

151 The issue of subletting in urban tenancy was first treated by Mayer-Maly, *Locatio conductio*, 27–33; thereafter by Frier, *Landlords and Tenants*, 30–31, 34–37, 78–82, 180, 183, 189–190; and since by Cardascia, G. "Sur une fonction de la sous-location en droit romain" in *Studi in onore di Arnaldo Biscardi* II (Milan 1982), 365–388.

152 This situation should be distinguished from the use of freedmen as *institores* where the liability of the owner of the tenement was governed by the rules of indirect agency (*actio institoria*).

that these individuals were probably financial speculators of low social status who made a living by undertaking what must undoubtedly have been a risky financial venture.[153]

When a primary tenant rented an entire tenement *en bloc*, he entered into a contract with the owner.[154] The aim of this contract was to create economic profit.[155] These individuals generally did not inhabit the same tenement as their secondary tenants.[156] Although an example of a contract between the owner/landlord and primary tenant has not survived, it seems safe to assume that the *lex locationis* between the owner and the primary tenant would have stated that the generation of economic profit by way of subletting was the sole purpose of the contract.[157] This is supported by the terminology used in legal texts on the matter. The primary obligation of the *locator* in *locatio conductio rei* was to grant the *conductor* use and enjoyment (*uti et frui*) of the building for the agreed time in return for the payment of rent.[158]

Whether the Roman jurists used similar terminology to describe the contracts between the primary tenant and his secondary tenants is an open question, since none of the examples mentioned in legal sources deal with subletting of commercial spaces (shops/taverns/stables) within an *insula*. In all surviving cases residential spaces (*cenacula*) have been sublet for personal use. Three texts on subletting of urban property (D.19.2.30 pr (Alfen. 3 Dig. a Paulo Epit.); D.19.2.7 (Paul. 32 ad Ed.); D.19.2.8 (Tryphon. 9 Disp.)) use the term *habitare* when referring to secondary tenants' use of the property.

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153 See Frier, 1977 (67) *JRS* 27–37; Frier, B.W. "Cicero's Management of His Urban Properties", 1978 *Classical Journal* (74-1), 1–6; Frier *Landlords and Tenants*, 30–31; Crook, *Law and Life*, 154; Johnston, D. *Roman Law in Context* (Cambridge 1999), 63.

154 See Frier, *Landlords and Tenants*, 34–37.

155 Mayer-Maly, *Locatio conductio*, 27; Frier, *Landlords and Tenants*, 36; Cardascia, *Sous-location*, 371–372. The economic profit at the basis of this type of contract is, for example, evident in the fact that the contract was terminated if the owner did not have the tenement ready by a certain date to enable the primary tenant to show it to potential secondary tenants (D.19.2.60 pr (Lab. 4 Post. a Iavoleno Epit.)).

156 A point noted by Mayer-Maly, *Locatio conductio*, 27: "*Nirgends aber wird ein Zusammen-Wohnen des Eigentümers oder des Hauptmieters mit den Untermietern bezeugt.*" See also Cardascia, *Sous-location*, 368, 373. The reasons for this are complex and may relate to the issue of limiting his liability for the actions of secondary tenants. By living elsewhere, the primary tenant did not incur part of the collective liability assigned to all the inhabitants of a tenement for things thrown or poured from the windows, see D.9.3.5.1 (Ulpian. 23 ad Ed.).

157 See C.4.65.6 (a. 224).

158 See D.9.2.9 pr (Ulpian. 32 ad Ed.); D.9.2.9.1 (Ulpian. 32 ad Ed.); D.19.2.15.2 (Ulpian. 32 ad Ed.). Failure to grant a *conductor* undisturbed use and enjoyment of the building was sufficient grounds for the *actio conducti*, see D.19.2.15.1 (Ulpian. 32 ad Ed.).

Amirante, in an analysis of the terms *habitare/habitatio* in *locatio conductio rei*, has concluded that these terms had a specific meaning in urban tenancy.[159] In Roman legal texts the phrase *locare habitationem* signified the letting of a space for personal use (accommodation) without the intention (or permission?) to exploit its ecomomic capacity through subletting.[160] The Roman jurists used this terminology to describe contracts between the primary tenant and secondary tenants which were concluded purely for accommodation. The precise use of the verb *habitare* also implies that subletting of these spaces was not generally possible, since only objects let *frui* (C.4.65.6) (a. 224) could be sublet where nothing contrary had been agreed.[161] It seems plausible that the commercial spaces within the tenement (shops etc.) would probably have been let *frui*, since it would have enabled the tenants of these commercial properties to exploit their economic capacity.

Once the contract had been concluded between the owner of the tenement and the primary tenant, further contracts could be made. The contracts with secondary tenants depended on the continued existence of the first contract with the owner, though certain protection measures were available to the primary tenant where his contract with the owner of the tenement ended prematurely. In the second series of contracts, the primary tenant became the landlord to the secondary tenants.[162]

A distinguishing feature of the contract between the owner of the tenement and the primary tenant was the time of payment. Primary tenants paid a lump sum in advance at the start of the lease year (1 July), while secondary tenants generally paid their annual rental instalments only at the end of the

[159] Amirante, *Locare Habitationem*, 457–465. See D.6.1.59 (Iulian. 6 ex Minic.); D.9.3.1.9 (Ulpian. 32 ad Ed.); D.19.1.53.2 (Lab. 1 Pith.); D.19.1.13.30 (Ulpian. 32 ad Ed.); D.19.2.24.2 (Paul. 32 ad Ed.); D.19.2.25.1 (Gaius 10 ad Ed. Prov.).

[160] The verbs *habitare* and *utor/uti/usus sum* seems to have been used as synonyms, see D.19.2.27 pr (Alfen. 2 Dig.).

[161] This view is proposed by Amirante, *Locare Habitationem*, 464–465. See also Du Plessis, P.J. "Subletting and the Roman Law of Letting and Hiring: Interpreting C.4.65.6" 2005 *RIDA* (52), 132–144.

[162] Cardascia, *Sous-location*, 368. Mayer-Maly, *Locatio conductio*, 30 maintains that there are no indications of a direct contractual relationship between the owner and the secondary tenants. Frier, *Landlords and Tenants*, 189–190, on the other hand, observes that although Roman jurists initially recognised the independence of the two sets of contracts (e.g. by refusing to recognise the middleman as the *gestor* of the owner to prevent a strengthening of secondary tenants' contractual claims against him), there are indications that in later law the jurists started to explore the notion of a direct contractual relationship between the owner of the tenement and the secondary tenants on account of *bona fides*.

term of the contract.[163] Payment in advance by the primary tenant seems to have been common convention in this type of contract, possibly necessitated by the speculative nature of the venture.[164] Although some scholars have argued that the time of payment in contracts of this kind was merely a matter of convenience from which no decisive legal conclusions may be drawn, this practice certainly benefited the owner of the tenement from a practical point of view.[165] By paying in advance, the primary tenant acquired the right to sublet the commercial and residential space within the tenement at a profit for a certain period of time.[166]

At the same time, the owner created a financial buffer between himself and the tenants.[167] In the event of non-payment by secondary tenants, the primary tenant bore the financial loss directly: the amount of rent obtained from secondary tenants at the end of the given year would be less than expected. This must have been one of the economic risks that primary tenants were exposed to when engaging in subletting of urban property and there are no indications that they could recover the resulting financial loss from the owners of tenements by requesting, for example, a remission of their rent. The primary tenant would not have any legal foundation for such a claim. He paid a lump sum in advance which entitled him to exploit the *insula* at his own discretion (within the confines of the contract) to recover the amount of rent paid in advance and also to generate some profit. Unless his ability to make money from the *insula* was in some way impaired by the owner's failure to execute the contract properly (e.g. maintaining the tenement in a good state of repair) or perhaps by *vis maior*, there would not be any legal grounds for the primary tenant to claim back a portion of the rent paid in advance if he, for example, failed to rent out all the spaces within the *insula* owing to a downturn in the rental market. This could also account

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163 See, for example, D.19.2.7 (Paul. 32 ad Ed.); D.19.2.30 pr (Alfen. 3 Dig. a Paulo Epit.) as well as the sources noted in Frier, 1977 (67) *JRS*, 27–37, 28 note 10. Only wealthy tenants paid annual rent instalments. Poorer tenants paid rent daily, weekly or even monthly, see Frier, 1977 (67) *JRS*, 27–37, 35.

164 See Litewski, W. "Die Zahlung bei der Sachmiete (Vor oder nach ablauf der Mietzeit) im römischen Recht" 2002 *TvR* (70), 229–249, 246–247.

165 See, for example, Mayer-Maly, *Locatio conductio*, 139 and Litewski, 2002 *TvR* (70), 229–249, who has argued that there seems to be no general rule in legal sources concerning tenancy about the time of payment of rent. It was a contractual measure that the parties arranged privately.

166 Profit from subletting could be as high as 20–33 %, see Frier, 1977 *JRS* (67), 27–37, 34–35. The amounts given in legal sources seem too rounded and may be hypothetical.

167 A point noted by Frier, 1978 *Classical Journal* (74-1), 1–6, 6.

for the relative paucity of sources relating to this practice, since it would have required a great deal of starting capital as well as a certain amount of risk-taking to enter into such a venture.[168]

The extant sources about subletting in the Roman law of urban property using a primary tenant fall into three categories. These are the sale of the tenement, payment of rent and finally breach of contract. Roman law regarded tenants as mere *detentores* (unprotected possessors) who were not entitled to the legal remedies available to a possessor in good faith against third parties threatening their peaceful enjoyment.[169] Despite the urban tenant's apparent lack of security of tenure, Kaser has argued that a seller in such circumstances would generally have obtained a guarantee (in the form of a special *pactum*) from the purchaser that he would allow the tenants to remain on the leased property for the duration of the term of the lease.[170] It would have been in the best interest of the seller to obtain such a guarantee, since failure to do so would enable the existing tenants, upon eviction by the new owner, to sue him under the contract of lease for breach of his obligation *uti frui praestare*.[171] The seller would in turn be able to sue the purchaser on the contract of sale (or the guarantee) if he broke his promise and decided to evict the tenants. One point not explicitly resolved in the legal texts is the effect of the transfer of ownership of the tenement upon the existing contracts of lease. The Romanist view is that the sale of the tenement *effectively* terminated any existing contract. Zimmermann observes: "… [i]t is not the contract of sale that had any detrimental effect on the relationship between the

[168] This could be one of the reasons why Cicero insisted that Atticus examine the characters of prospective (primary) tenants (*Att.* 12.32.2). An examination of this kind would not only provide insight into the moral character of the primary tenant, but would also establish whether he had sufficient financial reserves to pay the agreed lump sum of rent due to the owner even if he were to suffer a financial setback because of non-payment by secondary tenants or incomplete occupancy.

[169] While this would undoubtedly create a degree of discomfort for a tenant who had merely rented an apartment for personal use, the stakes were far higher for a primary tenant of an entire tenement who could be exposed to a large number of lawsuits from secondary tenants evicted by the new owner of the building.

[170] M. Kaser, *Das römische Privatrecht* 2nd ed. (Munich 1971), I §132 2 III 4, based on D.19.2.25.1 (Gaius 10 ad Ed. Prov.); D.19.1.13.30 (Ulpian. 32 ad Ed.). See also Frier, *Landlords and Tenants*, 82 and most recently Marrone, M. "Per una funzione 'strumentale' del diritto romano: in materia di possesso" in *Studia in memoria di Giambattista Impallomeni* (Milan 1999), 299–312.

[171] Frier, *Landlords and Tenants*, 68.

lessor/vendor and his tenant. It is only on account of the subsequent transfer of possession and of ownership that the lessor/vendor makes it impossible for himself to carry out his obligation under the contract of lease (namely to provide *uti frui praestare licere*), and that he exposes the tenant to the risk of being expelled by the purchaser. … [t]he contract of lease was, of course, not "broken" by either sale, transfer of ownership or any other transaction."[172]

Thus, the primary tenant, if protected by a *pactum*, was contractually in a state of limbo until the end of his term of lease when he presumably would have had to negotiate terms with the new owner.[173] The implication of this is quite startling. If the tenement were sold in year two of a conventional five-year term of lease with a *pactum* that the primary tenant would be allowed to continue the economic exploitation of the *insula*, there would be another three years during which the primary tenant would be obliged to pay the annual lump-sum of rent in advance to the purchaser even though no contract existed between them. If the purchaser contravened the terms of the *pactum* and evicted the secondary tenants, the primary tenant's only form of recourse was against the seller on the basis of the still-existing contract.[174] The seller could in turn sue the purchaser for the contravention of the *pactum*. This seems rather artificial. It would have been far less cumbersome for the purchaser to assume the role of the *locator* and to maintain the existing contract of lease with the primary tenant, especially where an *insula* was bought as an economic investment.[175] This is perhaps where a *novatio* of the debt would have been useful.

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[172] Zimmermann, *Obligations*, 379.

[173] Although the details are sketchy, Cicero seemingly did so in relation to the tenement that he had inherited from the estate of the Puteolan Banker, Marcus Cluvius, see Frier, 1978 *Classical Journal* (74-1), 1–6, 2 note 6.

[174] The question of the legal position of the tenant where the tenement/farmland was sold before the expiry of his term of lease remains controversial. See e.g. Thomas, J.A.C. "The Sitting Tenant", 1973 *TvR* (41), 35–44; Schrage, E.J.H. "*Emptio* (*nondum*) *tollit locatum*", 1978 *Acta Juridica*, 1–13; Verstegen, R. "*Qui fundum locavit, si vendat, curare debet* …" in *Mélanges Felix Wubbe* (Fribourg 1993), 484–508.

[175] Robinson, O.F. *Ancient Rome: City Planning and Administration* (London/New York 1992), 42 has demonstrated that a prohibition against the sale of buildings for the express purpose of demolition existed from the time of the late Republic. The problem with the sources is, however, that early prohibitive measures such as the *Senatusconsultum Hosidianum* of 44 CE specifically refer to houses and not to tenement buildings. An analysis of various sources has led Robinson to conclude that demolition of *insulae*, unlike *domi*, was indeed permitted.

There are two texts dealing with the issue of the sale of a tenement before the primary tenant's contract has expired.[176]

> D.19.1.53 pr (Lab. 1 Pith.) Si mercedem insulae accessuram esse emptori dictum est, quanti insula locata est, tantum emptori praestetur. PAULUS: immo si insulam totam uno nomine locaveris et amplioris conductor locaverit et in vendenda insula mercedem emptori cessuram esse dixeris, id accedet, quod tibi totius insulae conductor debebit.
>
> If it was specified that the rent of an apartment building would pass to the buyer, the buyer is owed whatever the building was leased out for. PAUL: But if you lease out the entire building and the lessee then leases it out for more and if in selling the building you say that the rent will belong to the buyer, then he receives what the lessee of the entire building owes to you. [Watson translation]
>
> D.19.2.58 pr (Lab. 4 Post. a Iavoleno Epit.) Insulam uno pretio totam locasti et eam vendidisti ita ut emptori mercedes inquilinorum accederent. Quamvis eam conductor maiore pretio locaret tam id emptori accedit quod tibi conductor debeat.
>
> [You tell me] you let a block of chambers at one rent for the whole building, and then sold it on the understanding that the purchaser should have a right to rents due from the inquilini (tenants). If your lessee should let at an increased rent, still the purchaser [only] has a right to the rent payable to you by the lessee himself. [Monro translation]

Both texts are by Labeo.[177] Both are concerned with the interpretation of a provision in a contract of sale (the *lex venditionis*) stating that the income of the tenement (*merces insulae*) should fall to the purchaser. Provisions of this nature were not uncommon in contracts for the sale of tenements and were presumably necessitated by the unfortunate position of the primary tenant following the sale of the tenement.[178] Labeo's opening statement in

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[176] See Mayer-Maly, *Locatio conductio*, 42–60; Cardascia, *Sous-location*, 374–375 for a discussion of these texts.

[177] Mayer-Maly, *Locatio conductio*, 31 views these two texts as proof of the absence of a direct contractual relationship between the owner of the tenement and the secondary tenants. This is qualified, however, by the secondary tenants' apparent entitlement to pay rent directly to the owner instead of the primary tenant in D.13.7.11. 5. See also Cardascia, *Sous-location*, 375, 385.

[178] D.20.4.13 (Paul. 5 ad Plaut.) Insulam tibi vendidi et dixi prioris anni pensionem mihi, sequentium tibi accessuram pignorumque ab inquilino datorum ius utrumque secuturum. ....

I sold you an apartment block on terms that the first year's rent accrued to me, the second to you, and that we should both have the benefit of securities given by the tenants. ... [Watson

D.19.1.53 pr is brief.[179] It is elucidated by an attached statement of Paul, who maintains that where a tenement was leased *en bloc* by a single tenant, presumably with the intention of subletting it for profit, and sold to a third party before the term of the contract had expired, the "income of the tenement" owed to the purchaser only included the amount that the seller (then the owner/landlord) and the primary tenant had agreed on in terms of their original agreement. A similar statement is found in D.19.2.58 pr (Labeo 4 Post. a Iavoleno Epit.).[180]

The primary source relating to payment in the context of subletting of a tenement is a confusing text attributed to Ulpian.

> D.13.7.11.5 (Ulpian 28 ad Ed.)[181] Solutam autem pecuniam accipiendum non solum, si ipsi, cui obligata res est, sed et si alii sit soluta voluntate eius, vel ei cui heres exstitit, vel procuratori eius, vel servo pecuniis exigendis praeposito. Unde si domum conduxeris et eius partem mihi locaveris egoque locatori tuo pensionem solvero, pigneraticia adversus te potero experiri (nam Iulianus scribit solvi ei posse): et si partem tibi, partem ei solvero, tantundem erit dicendum. Plane in eam dumtaxat summam invecta mea et illata tenebuntur, in quam cenaculum conduxi: non enim credibile est hoc convenisse, ut ad universam pensionem insulae frivola mea tenebuntur. Videtur autem tacite et cum domino aedium hoc convenisse, ut non pactio cenacularii proficiat domino, sed sua propria.

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translation]. Frier, *Landlords and Tenants*, 131 note 172 observes that rental income from a tenement only acceded to the purchaser where the parties had expressly agreed to it in the contract of sale.

179 Si mercedem insulae accessuram esse emptori dictum est, quanti insula locata est, tantum emptori praestetur. PAULUS: immo si insulam totam uno nomine locaveris et amplioris conductor locaverit et in vendenda insula mercedem emptori cessuram esse dixeris, id accedet, quod tibi totius insulae conductor debebit.

If it was specified that the rent of an apartment building would pass to the buyer, the buyer is owed whatever the building was leased out for. PAUL: But if you lease out the entire building and the lessee then leases it out for more and if in selling the building you say that the rent will belong to the buyer, then he receives what the lessee of the entire building owes to you. [Watson translation].

180 Insulam uno pretio totam locasti et eam vendidisti ita, ut emptori mercedes inquilinorum accederent. Quamvis eam conductor maiore pretio locaret, tamen id emptori accedit, quod tibi conductor debeat.

[You tell me] you let a block of chambers at one rent for the whole building, and then sold it on the understanding that the purchaser should have a right to rents due from inquilini. If your lessee should let at an increased rent, still the purchaser [only] has a right to the rent payable to you by the lessee himself. [Monro translation].

181 A detailed discussion of this text occurs in Frier, *Landlords and Tenants*, 124–132 where a comprehensive overview of earlier literature on the interpretation of this text may be found.

> It is correct to say that the money is paid not only where it is paid to the creditor himself to whom the thing is charged but also when it is paid with his consent either to someone whose heir he is or to his *procurator* or to a slave in charge of collecting debts. Hence, if you rent a house and sublet part of it to me and I pay my rent to your lessor, I will have the action on pignus against you (for Julian writes that it is permissible to pay him). And if I pay part to you and part to him, the same will be said *pro tanto*. It is clear that my own furniture and movables will be charged only with the sum for which I took my lodging; for it is not to be believed that my odds and ends were agreed to be charged for the rent of the whole block. However, this agreement is impliedly taken to have been made with the owner of the building as well, so that it is not from the bargain of the tenant sublessor that the owner derives advantage, but from his own. [Watson translation]

In this text, Ulpian explores the question when money is regarded as being paid.[182] He concludes that money is deemed by law to have been paid when it is paid to the creditor personally or, with his consent, to other people who are legally bound to him. Following this general statement, the text contains two examples of subletting of urban property. Although the two examples look similar, there are small, yet important differences. The change in terminology from *domus* and the *pars domi* in the first part of the text to *insula* and *cenaculum* in the latter part suggests the existence of two separate examples which were amalgamated into one text.[183] In the first scenario one person rents a house and sublets part of the house to a third party. Both primary and secondary tenant seemingly share the same premises. According to Roman law the primary tenant's movable property was tacitly pledged to the owner of the *domus* to secure payment of his rent.

The secondary tenant's movable property was similarly pledged to the primary tenant to the value of his rent. The text states that if the secondary tenant paid his rent in full to the owner of the *domus*, he would have an *actio pigneraticia* against his landlord (the primary tenant). This statement can only be comprehended if it is assumed that the primary tenant, not knowing that the secondary tenant had paid the rent to the owner of the *domus*,

[182] Frier, *Landlords and Tenants*, 127–128, discussing various earlier interpretations of this text, notably Wubbe, F.B.J. "Eine Lehre von subpignus im Corpus Iuris Civilis" 1958 *TvR* (20), 133–194, concludes that this text merely demonstrates that there was a "possibility" to pay the rent to the owner instead of the primary tenant. The text does not comment on the desirability of doing it.

[183] The terminology in this text is confusing. A *cenaculum* (apartment) could also form part of a *domus* and was not strictly limited to *insulae*, see D.7.1.13.8 (Ulpian. 18 ad Sab.). The latter part of the text reverts to the neutral term *aedes*.

attempted to enforce the pledge over the secondary tenant's movable property to the value of the rent owed. The same rule applied if the secondary tenant paid part of the rent to the owner of the *domus* and part to the primary tenant. If the primary tenant attempted to enforce the pledge for that portion of the rent, which in his view remained unpaid, the secondary tenant would have the *actio pigneraticia*.

The latter part of the text (*Plane ... propria.*) concerns a second example where a person rented an apartment within a tenement. The amount of rent owed by the primary tenant to the owner of the tenement is an important factor in this example. It seems doubtful that payment of a significantly large annual sum of rent owed by the primary tenant to the owner would have been secured merely by a pledge over the primary tenant's personal property, especially since most primary tenants seem to have been financial speculators of low social backgrounds. In all probability payment of rent would have been secured either by property given by the primary tenant as security for the debt (of which no record survives), or by giving the owner of the tenement a qualified entitlement (albeit indirect) to the primary tenant's pledges arising from his contracts with secondary tenants.[184] The latter option seems to have been followed in this text. Ulpian states that the movables of a secondary tenant are only bound as pledge for the rent of his specific apartment within the tenement and not for the rental of the entire tenement payable to the owner.[185]

The main problem is that he does not state to whom they are pledged i.e. whether the movables of the secondary tenant are bound to his landlord (the primary tenant) or to the owner of the tenement.[186] The answer to this question is not provided by the texts, but Frier has speculated, on the basis of the final sentence of the text, that the movable property of secondary

184 In theory, if the primary tenant rented the spaces within the *insula* at a profit, the sum total of the value of the pledges arising from these would exceed the value of the rental payment owed by the primary tenant to the owner of the tenement.

185 Frier, *Landlords and Tenants*, 124–132 argues that this text suggests that secondary tenant's movable property were regarded as being pledged to the owner of the tenement for the secondary tenant's payment of rent either to the primary tenant or to the owner. However, the extent of the pledge was limited to the amount of unpaid rent which the secondary tenant owed the primary tenant in terms of their agreement. If the primary tenant squandered the rent collected from his secondary tenants and went into arrears, the owner could not benefit from the primary tenant's pledge over the secondary tenants' property to secure their payment of rent.

186 Frier, *Landlords and Tenants*, 127–128 shows that the Greek paraphrase of this text in the *Basilica* (25.1.10) preferred the owner and this view proved influential in modern legal development.

tenants may only have been pledged to the owner of the tenement indirectly *via* the pledge of the primary tenant, since no contract existed between the owner of the tenement and the secondary tenants.[187] It would be disastrous if the owner were entitled to attach and sell potentially valuable movable property of secondary tenants if the primary tenant defaulted in his rental payment. Thus, Ulpian introduced a restriction in the latter example, possibly to protect the interests of secondary tenants.

There are four legal texts dealing with the issue of breach of contract involving the subletting of an entire tenement to a primary tenant. The first group of texts, D.19.2.30 pr (Alfen. 3 Dig. a Paulo Epit.) and D.19.2.35 pr (African. 8 Quaest.), discuss a similar situation.[188]

> D.19.2.30 pr (Alfen. 3 Dig. a Paulo Epit.)[189] Qui insulam triginta conduxerat, singula cenacula; ita locavit, ut quadraginta ex omnibus colligerentur: dominus insulae, quia aedificia vitium facere diceret, demolierat eam: quaesitum est, quanti lis aestimari deberet, si is qui totam conduxerat ex conducto ageret. Respondit, si vitiatum aedificium necessario demolitus esset, pro portione, quanti dominus praediorum locasset quod eius temporis habitatores habitare non potuissent, rationem duci et tanti litem aestimari: sin autem non fuisset necesse demoliri, sed quia melius aedificare vellet, id fecisset, quanti conductoris interesset, habitatores ne migrarent, tanti condemnari oportere.
>
> A man hired a block for 30 and let out the separate chambers so as to realise altogether 40; the owner of the block, finding there was something wrong in the building, pulled it down: the question was asked what the damages should be assessed at if the lessee of the whole should bring an action on his contract with the owner. The answer was that if the head landlord was compelled to pull the faulty building down, an account should be taken so as to arrive at an apportionment of the sum at which the owner had let the premises, with reference to the fact that the under-tenants for the time for which the repairs were going on were unable to occupy their chambers, and that the damages should be assessed accordingly: but if the demolition was unnecessary and was only done to improve the building, the head landlord ought to pay as much as would amount to a full compensation to the middleman for the loss of his lodgers. [Monro translation]

Before his term had expired, the owner decided to demolish the tenement citing its dilapidated state as the reason. The demolition of the tenement constituted a breach of contract. The question in this case, in line with

[187] See Frier, *Landlords and Tenants*, 127–128.

[188] Frier, *Landlords and Tenants*, 81 and also Vacca, L. "Ancora sull'estensione dell'ambito di applicazione dell'actio empti in età classica" 1994 *IVRA* (45), 35–73 for a brief discussion of the texts.

[189] See Frier, *Landlords and Tenants*, 81–82.

the *formula* of the *actio conducti*, is the value of the primary tenant's claim against the owner for failing to permit him undisturbed enjoyment of the leased property for the term of lease (*quidquid ob eam rem … dare facere oportet ex fide bona*). There are two options in this regard. The value of the claim could either reflect the amount of rent for which the property was let *en bloc* to the primary tenant (30), or the primary tenant's *id quod interest*. The latter amount would be higher since it would also include his lost profit. The text states that the motive of the owner for demolishing the tenement should dictate the value of the claim. If the demolition of the tenement building had been necessary to prevent it from collapse, the value of the claim had to be based on the amount for which it had been let to the primary tenant as well as on the periods remaining in the leases of secondary tenants during which they could not use and enjoy the rented spaces within the *insula*. This aspect undoubtedly reflected an attempt to recover from the owner the financial loss resulting from lawsuits brought by secondary tenants against the primary tenant on account of their loss of use and enjoyment. If the demolition of the tenement was unnecessary, however, the value of the claim was determined by the primary tenant's interest in the secondary tenants not moving out.[190]

In a text by Africanus, D.19.2.35 pr, the motive of the owner for demolishing the tenement is again mentioned as a measure for establishing the extent of the primary tenant's claim.

> D.19.2.35 pr (African. 8 Quaest.) Et haec distinctio convenit illi, quae a Servio introducta et ab omnibus ferre probata est, ut, si aversione insulam locatam dominus reficiendo, ne ea conductor frui possit, effecerit, animadvertatur, necessario necne opus demolitus est: quid enim interest, utrum locator insulae propter vetustatem cogatur eam reficere an locator fundi cogatur ferre iniuriam eius, quem prohibere non possit? Intellegendum est autem nos hac distinctione uti de eo, qui et suum praedium fruendum locaverit et bona fide negotium contraxerit, non de eo, qui alienum praedium per fraudem locaverit nec resistere domino possit, quominus is colonum frui prohibeat.
>
> The above distinction is quite in keeping with one first made by Servius, and generally aproved since, namely the following. A man lets a block of chambers *per aversionem*, and then effects repairs in such a way that the lessee cannot make use of the property; the point to consider is whether the act of demolition was necessary or not; for what difference does it make whether the lessor of such a block is compelled to rebuild it because it threatens to fall to pieces, or the lessor of a farm is compelled to submit wrong

190 See Honsell, *Quod Interest*, 119–121.

at the hands of someone whose conduct he cannot control? Of course in making this distinction I am supposing the case of a man who leases his own property and makes a contract in good faith, not of one who fraudulently leases what is the property of someone else, and consequently is powerless from warning the tenant off. [Monro translation]

The example in this text is somewhat more condensed than the previous one, but the situation is similar. The owner (as landlord) rents out a tenement *en bloc* to a middleman *per aversionem*. Through his rebuilding of the tenement, the tenant's enjoyment of the property becomes impossible. Owing to the terminological problem with subletting it is uncertain whether the primary tenant or secondary tenants are meant in this context. Presumably, since the singular is used, the enjoyment of the primary tenant (i.e. his ability to generate economic profit by subletting the tenement) became impossible through the owner's rebuilding. It is difficult to speculate about the extent of the rebuilding, but seeing that the text mentions demolition it has to be assumed that the tenement was at least partly demolished. As demonstrated in the previous text, the value of the primary tenant's claim is dictated by the owner's motive for demolishing the tenement.

The next group of texts is complex. D.19.2.7 (Paul 32 ad Ed.) contains a set of facts that also seems to be implied in D.19.2.8 (Tryph. 9 Disp.).[191]

D.19.2.7 (Paul 32 ad Ed.) Si tibi alienam insulam locavero quinquaginta tuque eandem sexaginta Titio locaveris et Titius a domino prohibitus fuit habitare, agentem te ex conducto sexaginta consequi debere placet, quia ipse Titio tenearis sexaginta.

I let to you a block of chambers which belongs to a third party for 50, you underlet the same to Titius for 60, and Titius is ordered off by the true owner. If you sue me on the contract, the law allows you to get 60 by way of damages, because that is the amount which you are compellable to pay Titius. [Monro translation]

D.19.2.8 (Tryph. 9 Disp.) Nos videamus, ne non sexaginta praestanda nec quinquaginta sint, sed quanti interest perfrui conductione, tantundemque consequatur medius, quantum praestare debeat ei, qui a se conduxit, quoniam emolumentum conductionis ad comparationem uberioris mercedis

[191] The controversy surrounding the authorship of these fragments is fully explored in Cardascia, *Sous-location*, 377–380, who points out that the confusion is probably the result of a scribal error and that there are no compelling reasons to ascribe the texts to authors other than those noted in the *Corpus Iuris Civilis*. These texts have also been mentioned (in passing) by Molnár, 1982 *BIDR* (85), 127–142 and Reichard, I. *Die Frage des Drittschadensersatzes im klassischen römischen Recht* (Cologne 1993), 272–283. See extensively also Honsell, *Quod Interest*, 131–134.

computatum maiorem efficit condemnationem. Et tamen primus locator reputationem habebit quinquaginta, quae ab illo perciperet, si dominus insulae habitare novissimum conductorem non vetuisset: quo iure utimur.

It is worth considering whether it is not the real truth that the proper damages are neither 60 nor 50, but whatever you lose by not getting the full benefit of your contract, so that the middleman gets the same amount as his own tenant could have been called upon to give him, since the advantage he (the middleman) would get from his tenancy, as estimated on the footing of the larger rent, leads to an increase in the sum to be adjudged him; at the same time the original lessor can claim to be credited with the 50 which he would have received from his lessee, [the plaintiff] if the owner had not interfered with the sublessee's occupation of the premises: and so the law stands.
[Monro translation]

In D.19.2.7 the *locator* (A) [i.e. not the owner] let an entire tenement to a tenant (B) for 50. The tenant (B) sublet the tenement to a further tenant (Titius) for 60. The owner (someone other than A) refused Titius occupation of the tenement.[192] The reason for this refusal is not mentioned in the text.[193] Since the text states that A was not the owner, his position arouses some curiosity. It does not reveal whether A obtained the tenement lawfully or unlawfully. Cardascia's exposition of this matter seems most plausible: A obtained the tenement lawfully, though the exact *causa* remains unclear (possibly as *procurator* of the owner). The initial tenant (B) sues A and the extent of his claim against A is the crux of the text. The text states that A should pay 60 to B as this is the extent of his (B's) responsibility towards Titius.[194] The reasoning behind this calculation is clear. The owner's refusal

192 Reichard, *Drittschadensersatzes*, 274–275 has rightly observed that it seems somewhat unlikely that Titius personally occupied the entire *insula*. He speculates that Titius was indeed another primary tenant who rented the *insula* with a view to subletting the individual spaces for profit, or following Kaser, 1957 *ZSS* (rA) (74), 155–200, 168, that this example was perhaps not a real case, but rather a school example in which the facts were manipulated to convey a specific legal point. This seems plausible as it is doubtful that the owner of a tenement would not have excluded the possibility of subletting as mentioned in C.4.65.6 (a. 224).

193 The reason for the refusal may be one of those listed in C.4.65.3 (a. 214).

194 Frier, *Landlords and Tenants*, 78–82, 78 note 60 of this work for earlier literature on these texts. The most controversial aspect of this text has been the motivation for the amount of the claims. Kaser, 1957 *ZSS* (74) 155–200, 167 attempts to explain the differences in the extent of the claims in terms of positive and negative *Interesse*. Reichard, *Drittschadensersatzes*, 275–276 supports the (alternative) view of Medicus, D. *Id quod interest: Studien zum römischen recht des Schadensersatzes* (Cologne 1962), 98 that the reason for limiting Titius' claim to 60,000 HS lies in the fact that there is no credible reason that his *habitare* was worth more than that. Frier, *Landlords and Tenants*, 80 views the amount of 60,000 HS as equivalent to an *id quod interest* sum. A has to pay *id quod interest* to B, because he

to permit Titius to occupy the leased premises cannot be ascribed to the malice or negligence of B. It would be unjust to expose him to a claim from Titius, the value of which would be more than the amount B owes to A. If this were allowed, B would be left with a deficit of 10 when sued by Titius. The next text elaborates on this theme. In D.19.2.8 Tryphoninus asks whether, on the same set of facts, the extent of B's claim should be *id quod interest*. It is unclear whether this question is expressly answered, but the principle is expressed that the value of the middleman's (B's) claim should equal the total amount for which he sublet the tenement, since this kind of contract is concluded for economic profit and it therefore raises the amount of the claim. This is one of the few texts in which the importance of generating a profit, which is the reason for entering into this kind of economic venture, is highlighted.

3.3.3. Domus

The renting of a *domus* is mentioned only incidentally in Roman legal sources. Those cases mentioned by the Roman jurists reflect general notions which are familiar to the renting of urban property.[195] D.19.2.45 pr (Paul. 52 ad Ed)[196] suggests that properties of this type were rented out with staff. D.19.2.60 pr (Lab. 5 Post. a Iavoleno Epit.)[197] shows the importance of the reciprocal obligation at the basis of the contract. Not only was the *locator* contractually obliged to provide the *conductor* with *uti frui* at the start of the contract, he also had to maintain the property in a good state of repair to maintain the level of *uti frui* required by the tenant.[198] The rules

guaranteed the right to (sub) lease to B. This warranty of right only extends to B. Titius' claim against B is merely for rent paid and does not reflect an *id quod interest* sum. The reason for the differences in claim is that the basis of B's claim against A is lack of right (to lease). B, on the other hand, merely owes rent paid in advance to T (in other words a sum less than *id quod interest*), because B derived his right to let to T, not from A, but from the contract.

[195] See, for example, C.4.65.3 (a. 214) and D.13.7.11.5 (Ulpian. 28 ad Ed.).

[196] Si domum tibi locavero et servi mei tibi damnum dederint vel furtum fecerint, non teneor tibi ex conducto, sed noxali actione.

If I let you a house, and my slaves damage or steal your property, you cannot sue me on the contract, you can only bring a noxal action. [Monro translation].

[197] Cum in plures annos domus locata est, praestare locator debet, ut non solum habitare conductor ex calendis illis cuiusque anni, sed etiam locare habitatori si velit suo tempore possit. ....

If a house is let for so many years, the lessor is bound to secure that the lessee shall be able not only to occupy it himself from the first of such and such a month in each successive year, but also to underlet it to a lodger, if he wish, at whatever time suits his convenience. ... [Monro translation]. See also Horak, *Rationes Decidendi*, 102–103.

[198] Compare D.19.2.9 pr and D.19.2.28.2.

on pledge and hypothec applied to all goods brought into the rented property even without the knowledge of the landlord as in C.4.65.5 (223 CE).

Before concluding this section on letting and hiring of property in an urban setting, it is worth pointing out that a number of legal texts mention the letting and hiring of an *aedes* and an *aedificium*.[199] These terms fulfil much the same function as *praedium* in the context of property in a rural setting. Given their generic nature, it is impossible to create stock examples from them. The same can be said of the term *area* (a plot of land in an urban location with no buildings on it). A handful of texts mention an *area*, but there is insufficient information to construct a comprehensive account.[200] The texts show that the rules on *pignus* and *hypothec* also applied to an *area* as in D.20.2.3 (Ulpian. 73 ad Ed.). D.19.2.57 (Iavolen. 9 Post. Lab.), a case where a tenant caused damage to the *locator*'s wall through his building activities, also mentions an *area*.

3.4. *Other Categories of Commercial Immovable Property*

Rural and urban property feature most prominently in the Roman jurists' discussion of the contract of letting and hiring, but other examples of immovable property are also mentioned in passing.[201] D.32.1.30.1 (Lab. 2 Post. a Iavoleno Epit.) mentions gardens rented from the State and D.39.4.15 (Alfen. 7 Dig.) mentions Caesar letting out whetstone quarries on Crete also in the context of public law.[202] Some of these cases deserve closer investigation.

3.4.1. Taberna

Berger defines a *taberna* as "a shop used for the sale of merchandise or for an industrial or commercial activity."[203] A number of Roman legal texts mention the *taberna* in the context of letting and hiring. D.5.1.19.2 (Ulpian. 60 ad Ed.) shows that the fact that a man has rented a shop could be used as a factor in determining whether he has domicile for the purpose of bringing

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199 D.13.7.11.5; D.19.2.9.1; D.19.2.19.4–5; D. 19.2.25.1–2; D.19.2.30 pr. See also renting of a dwelling (*habitatio*) in D.19.2.5 (Ulpian. 28 ad Ed.); D.19.2.9 pr-1 (Ulpian. 32 ad Ed.); D.19.2.25.1 (Gaius 10 ad Ed. Prov.); D.19.2.28 pr-1 (Lab. 4 Post. a Iavoleno Epit.); D.19.2.30 pr (Alfen. 3 Dig. a Paulo Epit.).

200 See, for example, D.6.1.62 pr (Pompon. 6 Quaest.).

201 Letting of meadows in CIL.3.14356, 3a.

202 For other examples, see Vigneron, *La conception originaire*, 519–522 who mentions a pottery which has been rented out. See also Scheidel, *Grundpacht*, 44 for other examples.

203 Berger, *Encyclopedic Dictionary*, entry on the term *taberna*. See also Knapp, *Invisible Romans*, 225 for a reference to a cook shop/kitchen rented by three former prostitutes.

a lawsuit. D.8.5.8.5 (Ulpian. 17 ad Ed.) shows that a *conductor* of a cheese shop, who was prevented from discharging fumes by the neighbours, may bring a suit *ex conducto* against the *locator* (the city council of Minturnae) for failing to provide *frui*. D.7.1.27.1 (Ulpian. 18 ad Sab.) shows that a shop held in usufruct may also be let out by the holder of the usufruct, but he may not change the substance of the property. Finally, as has already been discussed in relation to D.19.2.45.1 (Paul. 27 ad Ed.) shops could be rented out together with staff which, when they cause loss to the *conductor*, could result in legal claims against the *locator*.[204]

3.4.2. Balneum

There is not much information in Roman legal texts on the renting of baths.[205] D.19.2.30.1 (Alfen. 3 Dig. a Paulo Epit.)[206] contains an example of a person who rented baths from the state and paid the rent in advance. After six months the baths were consumed by fire. Following Servius Sulpicius Rufus, the *conductor* had a claim for the return of the rent paid in advance in proportion to the amount of time for which the baths existed. D.20.4.9 pr (African. 8 Quaest.) demonstrates a case where rental payment was secured by giving a valuable slave, Eros, as a hypothec. Apart from these two statements, little else can be gleaned from the sources. D.3.2.4.2 (Ulpian. 6 ad Ed.)[207] mentions slave attendants in a bath who are hired

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[204] See Aubert, *Business Managers*, 113.

[205] See CIL.4.1136 which contains an advertisement for renting baths. See also D.19.2.58.2 (Lab. 4 Post. a Iavoleno Epit.). See also generally Robinson, O.F. "Baths: an Aspect of Roman Local Government Law" in *Sodalitas* III (Naples 1984), 1082–1065.

[206] Aedilis in municipio balneas conduxerat, ut eo anno municipes gratis lavarentur: post tres menses incendio facto respondit posse agi cum balneatore ex conducto, ut pro portione temporis, quo lavationem non praestitisset, pecuniae contributio fieret.

An aedile took a lease of baths in a town, in order to enable the townspeople to enjoy baths for a year free of charge; the baths were three months later destroyed by a fire:—Held, the lessor of the baths was liable to an action on the contract with the lessee for return of money paid in proportion to the time during which he had failed to supply means of bathing. [Monro translation].

[207] Ait praetor: "qui lenocinium fecerit". Lenocinium facit qui quaestuaria mancipia habuerit: sed et qui in liberis hunc quaestum exercet, in eadem causa est. Sive autem principaliter hoc negotium gerat sive alterius negotiationis accessione utatur (ut puta si caupo fuit vel stabularius et mancipia talia habuit ministrantia et occasione ministerii quaestum facientia: sive balneator fuerit, velut in quibusdam provinciis fit, in balineis ad custodienda vestimenta conducta habens mancipia hoc genus observantia in officina), lenocinii poena tenebitur.

The praetor says "One who has kept a brothel." A brothel-keeper is a man who has had slaves for hire as prostitutes, though the man who carries on the trade with free girls is in the same position. He is liable to punishment for brothel-keeping whether this is his main occupation or whether he carries on another business as well, for example, if he was the keeper of an inn or tavern and had slaves of this sort working for him who took advantage of

by customers to protect their clothing and D.16.3.1.8 (Ulpian. 30 ad Ed.)[208] notes that a *balneator* (the keeper of a bath) who has received money in return for guarding clothes may be sued on hire for the loss of these. It is worth pointing out that according to D.1.15.3.5 (Paul. 1 de Off. Praef. Vig.) the *Praefectus Vigilum* also had jurisdiction over servile bath attendants and could try them for theft of clothes.

3.4.3. Horreum

One of the consequences of the prominence of tenancy of land in a rural location for an agricultural purpose in D.19.2 and C.4.65 is that certain examples of letting and hiring are merely mentioned in passing.[209] A prime example of this is the letting and hiring of warehouses. Although it is clearly a form of *locatio conductio rei* and was therefore governed by the same legal rules which applied to any form of letting and hiring of movable or immovable property mentioned in the legal sources, it had certain legal peculiarities which set it apart from other examples of the contract. Until recently, information about the letting and hiring of warehouses was based on a small number of legal texts augmented by a few epigraphic inscriptions which were widely discredited.[210] Since then, the discovery and publication of the Murecine archive of the *Sulpicii* have brought to light two new *tabulae* dealing with the letting and hiring of warehouses. While these have been treated extensively in the context of moneylending, proper attention has not been given to them in the context of *locatio conductio*.[211]

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their employment to ply their trade, or if he was a bath-manager having, as is the practice in certain provinces, slaves in his bath hired to guard clothing who following this kind of trade in their place of work. [Watson translation].

208 Si vestimenta servanda balneatori data perierunt, si quidem nullam mercedem servandorum vestimentorum accepit, depositi eum teneri et dolum dumtaxat praestare debere puto: quod si accepit, ex conducto.

If clothes given to the keeper of a bath for safekeeping are lost and if the keeper has received no fee for the safekeeping, I think that he is liable in an action on deposit and that he ought to be responsible only for his fraud; but where he has received a fee, he is liable to an action on hire. [Watson translation].

209 The following is based on Du Plessis, P.J. "Between Theory and Practice: New Perspectives on the Roman law of Letting and Hiring" 2006 *CLJ* (65), 423–437.

210 Warehouses (*horrea*) are mentioned in the following texts, D.19.2.60.9 (Lab. 5 Post a Iavolen. Epit.); D.19.2.60.6 (Idem); D.36.4.5.22 (Ulpian. 52 ad Ed.); D.20.4.21.1 (Scaev. 27 Dig.); D.20.2.3 (Ulpian. 73 ad Ed.); D.19.2.56 (Paul. 1 de Off. Praef. Vig.); D.14.5.8 (Paul. 1 Decr.); D.10.4.5pr (Ulpian. 23 ad Ed.); D.9.3.5.3 (Ulpian. 24 ad Ed.); D.5.1.19.2 (Ulpian. 60 ad Ed.); C.4.65.1 (a. 213). See comprehensively Rickman, G. *Roman Granaries and Store Buildings* (Cambridge 1971) for a discussion of the epigraphic sources.

211 On the treatment of these texts in the context of moneylending, see, for example, Macqueron, J. "Deux contrats d'Entrepôts du 1er Siècle P.J.C. T.Pomp. 7 et 44" in *Études offertes*

Any discussion of warehouses has to take account of their place and function within Roman commerce.[212] Warehouses (like *insulae*) were economic assets that were administered by their owners using a variety of management structures.[213] The most common forms of warehouse management involved the use either of slaves or contractual middlemen.[214] The latter seems to have been particularly popular judging by the number of legal texts devoted to it in the context of the law of letting and hiring. The structure outlined in these texts involves three parties, namely the warehouse owner (*dominus horreorum*) (who could be either an individual or *procurator* acting on behalf of the Roman state or a local municipality), the *horrearius* (contractual middleman) and the customers who used the warehouse for storage and safekeeping of goods.[215] The *horrearius* rented the entire warehouse from the owner with the aim to produce economic profit by subletting spaces within it at a higher cost to his customers. This three-tiered structure also occurs in other commercial ventures in Roman law, namely tenancy of tenement buildings and ships and was, as has been pointed out elsewhere, devised to devolve legal (not to mention financial) responsibility away from the owner and onto the contractual middleman.[216] Thus, the management of warehouses using contractual middlemen in Roman law was dealt with under the heading of the law of letting and hiring.[217]

Little is known about the details of the agreement between the warehouse owner and the *horrearius*, since an example of such a contract has not survived.[218] At most it may be assumed that the agreement would have been governed by the rules of *locatio conductio rei* in Roman private law where the warehouse owner was an individual (not the state). The main aim of this contract would have been to produce profit for the *horrearius* and it

a Pierre Kayser vol. 1–2 (Aix-en-Provence 1979), 199–237 and generally Crook, J.A. and Wolff, J.G. *Rechtsurkunden in Vulgärlatein aus den Jahren 37–39 N.Chr.* (Heidelberg 1989).

212 For a comprehensive survey of academic literature on this topic, see Wacke, A. "Rechtsfragen der römischen Lagerhausvermietung" 1980 *Labeo* (26), 299–334, 299.

213 This is confirmed by the two tablets in question. See also Rickman, *Roman granaries*, 195.

214 See France, J. "Les personnels et la gestion des entrepôts Imperiaux dans le monde Romain" 2008 *REA* (110), 483–507, 485–492.

215 Wacke, 1980 *Labeo* (26), 299–324,301–302.

216 Du Plessis, P.J. "Janus in the Roman Law of Urban Lease" 2006 *Historia* (55), 58–63.

217 Greco-Egyptian law dealt with the matter differently, see Macqueron, *Deux contrats d'Entrepôts*, 209.

218 Rickman, *Roman granaries*, 196 notes that the duration of such a contract was usually five years.

seems likely that the warehouse would have been let on these terms (*frui*).[219] Apart from that, however, virtually nothing is known about the actual terms of such an agreement. There is one legal text that addresses an issue which may have formed part of the terms of an agreement between these parties.

> D.19.2.60.9 (Lab. 5 Post. a Iavoleno Epit.)[220] Rerum custodiam, quam horrearius conductoribus praestare deberet, locatorem totorum horreorum horreario praestare non debere puto, nisi si in locando aliter convenerit.
>
> I am of the opinion that when a man lets out a whole warehouse he does not incur the same liability towards the lessee for the custody of goods warehoused as the lessee himself does towards sub-lessee of separate compartments,—in default of special agreement. [Monro translation]

This would suggest that where the parties made another arrangement about the extent of their contractual responsibilities, it would have had to be included in the terms of their agreement.[221] It is not the intention of this section to enter into the academic debate about *custodia*, but a brief comment on the above-mentioned text is required. As mentioned above, *custodia* was not a "standard of liability" in the contract of letting and hiring. In classical Roman law, the *conductor* was liable only for *dolus* and *culpa*, but in some instances *custodia* is mentioned to convey the idea that the undertaker of a task took the property of the customer and had to look after it in the context of a commercial transaction.[222]

Even less is known about the agreement between the warehouse owner and the *horrearius* where the warehouse was owned by the state or a local municipality. It is, for example, difficult to establish whether this kind of agreement would have been governed by Roman private law. Suffice it to say that there are suggestions that legal rules similar to those governing *locatio conductio rei* in Roman private law may have governed these contracts as well.[223]

The nature of the agreement between the *horrearius* and his customers who left goods in the warehouse for safekeeping long remained controversial. From early on in the scholarly debate it was agreed that these contracts

219 See C.4.65.6 (a. 224) and on the meaning of the term "*frui*" see Du Plessis, 2005 *RIDA* (52), 133–146.

220 On this point, see comprehensively, Rickman, *Roman Granaries*, 205.

221 See C.4.65.1 (a. 213). For the procedure where theft occurred, see C.4.65.4 (a. 222) with a curious reference to Ulpian as well as D.19.2.55 pr (Paul. 5 Sent.).

222 For a summary of the controversy, see Zimmermann, *Obligations*, 376. See also Serrano-Vicente, *Custodiam praestare*, 351 for the significance of this form of letting and hiring for the development of *custodia*.

223 See D.8.5.8.5 (Ulpian. 17 ad Ed.); D.32.1.30.1 (Lab. 2 Post. a Iavoleno Epit.).

could not have been that of *depositum*, since the latter was essentially gratuitous and the legal texts mention that individuals paid for the safekeeping of their wares.[224] It was furthermore accepted that these contracts had to be that of *locatio conductio*, but scholars could not agree on the type of lease in terms of the modern trichotomy imposed upon it. Thus it was fiercely debated whether these contracts should be classified as *locatio conductio operarum*, *locatio conductio operis* or even a combination of *locatio conductio rei* and *operis*.[225] The current view on the nature of this contract is that proposed by the late Professor Thomas in his 1966 article on the matter.[226] Although he was critical of the modern trichotomy imposed on *locatio conductio*, he argued, based on an analysis of the legal texts, that the contract between the *horrearius* and his customers could be nothing other than *locatio conductio rei*.

Information about the letting and hiring of state-owned warehouses is almost exclusively based on the so-called *lex horreorum Caesaris*, a marble tablet of approximately 98 cm by 88 cm discovered in 1885 near the *Porta Salaria* in the North of Rome.[227] It has been published with a number of possible reconstructions, but as Rickman observed in his 1971 book on Roman granaries: "... there is enough agreement concerning the sense, if not always concerning the wording, of the inscription, to extract much information about the conditions listed".[228] It is generally agreed that this inscription dates from the reign of the Emperor Nerva (96–98 CE).[229] The text contains a number of legal rules concerning the letting of spaces within a warehouse.

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224 See Wacke, 1980 *Labeo* (26), 299–324, 307 for a survey of the debate.

225 See Wubbe, F. "Zur Haftung des Horrearius" 1959 *ZSS* (rA) (76), 508–520; Thomas, J.A.C. "*Custodia* and *Horrea*" 1959 *RIDA* (6), 371–383; Cannata, C.A. "Su alcuni problemi relativi alla '*locatio horrei*' nel diritto romano classico" 1964 *SDHI* (30), 235–262; Thomas, J.A.C. "Return to *Horrea*" 1966 *RIDA* (13), 353–368, 362; Wacke, 1980 *Labeo* (26), 299–324, 308 and an overview in Zimmermann, *Obligations*, 346 note 37 with literature.

226 "In view of my previous oscillation between *locatio rei* and *locatio operis faciendi*, it is perhaps right that I should now state firmly my belief that—if indeed we have to adopt one of the modern categories—it would be *locatio rei*; the uniformity of the language of the texts which say that *horrearius locat* leaves no doubt that the depositor is a *conductor*. I say, if we must adopt one of the modern categories, because it seems to me that the case of the *horrea* contract is really another confirmation that the Romans did not employ our scheme."—Thomas, 1966 *RIDA* (13), 353–368, 362.

227 See Rickman, *Roman Granaries*, 198–199.

228 Rickman, *Roman Granaries*, 199.

229 *FIRA* III, 455.

[*In his h*]orreis [*Imp*(*eratoris*)—*C*]aesaris Aug(usti) loc(antur) [*mercatoribus frument*]ar(iis) armaria et loca [*cum operis cella*]rar(iorum) ex hac die et ex [*k*(*alendis Ianuariis*)].

Lex horreorum.

[*Quisquis in annum futurum retinere volet quod conduxit armarium aliud*]ve quid, ante idus Dec(embres) pensione soluta renuntiet. Qui non [*renuntiaverit, si volet retinere et cum horreario aliter pro i*]nsequente anno non transegerit, tanti habebit, quanti eius gener(is) [*armarium eo anno ibi locari solebit, si modo ali locatum n*]on erit.

Quisquis in his horreis conductum habet, elocandi et [*substituendi ius non habebit. Invectorum in haec horrea cu*]stodia non praestabitur. Quae in his horreis invecta inlata [*erunt, pignori erunt horreario, si quis pro pensionib*]us satis ei [*non fece*]rit.

Qui]squis in his horreis conductum habet et sua [-----------] fuer(it) venia.

[*Quis*]quis in his horreis conduct(um) habet pensione soluta chirogr(apho) [*liberabitur* ...

Quisquis habens conductu]m horreum su[*a ibi*] reliquerit et custodi non adsignaver(it), horrearius sine culpa erit.

In the warehouses of the Emperor ... Caesar Augustus are let to grain merchants, chests and spaces together with the *operae* of warehouse attendants from this day and from the 1st of January.

The *Lex Horreorum*.

Whoever wishes to retain the chest or other space which he has rented for a further year, shall give notice before the 13th of December and once payment has been made. He who has not given notice, if he wish to retain the chest or other space and has not transacted otherwise with the *horrearius*, shall pay as much as that chest is customary let out for in that year, provided it has not been let to another.

Whoever has let [a space] in these warehouses, shall not have the right to sublet or to substitute. Custody of the goods brought into the warehouse shall not be vouched for. Those goods which have been brought into the warehouse shall be deemed to be pledged to the *horrearius*, provided that security has not been given for the rents.

Whoever has rented [a space] in these warehouses, ..., has permission. Whoever has rented [a space] in these warehouses and has paid his rent [with proof] by chirograph, shall be freed ....

Whoever has rented a warehouse and has left his goods there and has not handed it to a custodian (attendant?), the *horrearius* shall be without *culpa*.

[Own translation]

Apart from certain practical issues relating to the payment of rent and the obtaining of a receipt, the majority of the rules of law contained in it e.g. the right to sublet, the liability for *custodia* and the tacit hypothec over *invecta et illata* brought into the warehouse by *conductores* are corroborated by legal texts in the Digest and the Code.

Since then, a new piece of evidence forming part of the Murecine archive has come to light. It is a document recording a *lex horreorum* of spaces within a state-owned warehouse (TPSulp. 45).

> C(aio) Caesare Germanico Augusto Ti(berio) Claudio Nerone Germanico co(n)s(ulibus), sextum nonas Iulias (2 July 37 AD). Diognetus C(aii) Novi Cypaeri servus scripsi iussu Cypaeri domini mei coram ipso me locasse Hesycho Ti(berii) Iuli Augusti l(iberti) Eueni ser(vo) horreum duodecimum in horreis Bassianis publicis Puteolanorum mediis, in quo repositum est triticum Alexandrinum, quod pignori accepit hac die a C(aio) Novio Euno, item in iisdem horreis imis intercolumnia, ubi repositos habet saccos leguminum ducentos, quos pignori accepit ab eodem Euno. Ex k(alendis) Iuliis in menses singulos sestertiis singulis n[u]m(mis). Act(um) P[u]t(eolis).[230]

> I Diognetus, slave of Gaius Novius Cypaerus, have written: By order of my master Cypaerus and in his presence I have leased to Hesychus, slave of Tiberius Julius Evenus, imperial freedman, Bunker No. 12 on the middle level of the publicly owned Bassian warehouses in Puteoli, in which is stored the Alexandrian wheat which he [Hesychus] has accepted today as security from Gaius Novius Eunus. Likewise in the same warehouses, on the lowest floor, [I have leased to Hesychus] a space between the columns where he holds 200 sacks of legumes, which he has received from the same Eunus as security. From the 1st of July the rental is HS 1 per month. [Jones translation]

Although this tablet predates the *lex horreorum Caesaris* by roughly 60 years and comes from a town in Italy rather than from Rome, there is no evidence to suggest a deviation in legal practice either geographically or temporally. To understand the importance of this tablet and its relationship to the *lex horreorum Caesaris*, the events described in it and their wider context have to be understood. Gaius Novius Cypaerus was a *horrearius* who had rented the entire Bassian Public Granary from the city of Puteoli with the aim to sublet individual spaces for profit.[231] The running of the warehouse was assigned to his slave, Diognetus. One of his customers, Gaius Novius Eunus owned a certain amount of wheat which he had previously stored

[230] Reconstruction taken from Camodeca, G. *Tabulae pompeianae sulpiciorum* (*TPSulp.*)*: edizione critica dell'archivio puteolano dei Sulpicii*. 2 vols. (Rome 1999), 122.

[231] See Lintott, A. "Freedmen and slaves in the light of legal documents from first-century AD Campania" 2002 *CQ* (NS) (52-2), 555–565, 557.

in the Bassian Public Granaries. For reasons not mentioned in this tablet (but evidenced by TPSulp. 51–52), Eunus needed to borrow money and approached a moneylender, Tiberius Iulius Evenus for a loan. The latter, acting through his slave Hesychus, agreed to lend Eunus the money but requested that he provide real security to ensure the repayment of the loan. Eunus volunteered his wheat stored in Bassian Public Granaries. To ensure possession of the wheat (a pledge), Evenus, using his slave Hesychus, "took over" the lease of the grain stall. Evenus could not merely assume Eunus' position as *conductor* since Roman law was uncomfortable with the substitution of contracting parties and a new contract of lease therefore had to be made. This document records a *lex locationis* detailing the second contract. The price mentioned in this inscription is problematic. It has been suggested that a low price such as the one mentioned would have rendered the contract legally void.[232] To understand this point, we must look more generally at the notion of the *merces* in the contract of letting and hiring.

The term *merces* is most commonly used in Roman legal texts to describe the rent, but related words such as *pecunia* and *pretium* also occur.[233] As far as the nature of *merces* is concerned, there are two opposing views on the matter. Some maintain that *merces* in classical Roman law had to consist wholly of money, while others, arguing interpolation, maintain that it could also consist partly of money and partly of goods (especially where fruit-bearing objects had been let out).[234] Most recently, it has been demonstrated that the differences of opinion among the Roman jurists on this point should be viewed in the context of a debate between the Proculians and the Sabinians about the relationship between the contract of letting and hiring and other legal institutions in Roman law.[235] In light of this, it seems prudent to adopt a more flexible approach to this issue. In most Roman legal texts *merces* consists wholly of money. However, in letting and hiring of fruit-bearing objects, the parties sometimes made different arrangements which included part money part fruits. In these cases, when litigation took place, it seems to have been a matter of judicial interpretation whether the contract was that of letting and hiring or another legal transaction.[236]

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232 Jones, *Bankers*, 95–96.

233 Molnár, I. "Rechte und Pflichten der Subjekte der *locatio conductio*" 1983–1984 *Index* (12), 156–188, 170–171.

234 Thomas, J.A.C. "The Nature of *merces*" 1958 *Acta Juridica*, 191–199; Mayer-Maly, *Locatio conductio*, 129–135; Molnár, 1983–1984 *Index* (12), 156–188, 171–172.

235 Fiori, *Locatio conductio*, 236–249.

236 See D.19.2.19.3 (Ulpian. 32 ad Ed.), D.10.3.23 (Idem).

Since all aspects of the contract of letting and hiring were based on consent, it meant that the parties had to agree on the rent before the contract could come into existence. The following text is particularly informative:

> D.19.2.2 pr (Gaius 2 Cott.)[237] Locatio et conductio proxima est emptioni et venditioni isdemque iuris regulis constitit; nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic et locatio et conductio contrahi intellegitur, si de mercede convenerit.
>
> *Locatio-conductio* closely resembles purchase and sale and is goverened in respect of its formalities by the same rules of law; for just as purchase and sale can only be contracted so soon as the parties agreed about the price, so too *locatio-conductio* is only held to be formed when the parties are agreed about the payment to be made. [Monro translation]

Although it is attributed here to Gaius' *Res Cottidianae*, it also appears with slightly altered wording in the Institutes of Gaius (Inst.Gai.3.142).[238] D.19.2.2 pr states that the parties have to reach consensus *de mercede*, while the passage from the Institutes requires consent on a *certa merces*. It would be unwise to attach too much significance to the differences between these two statements. As long as the consent of the parties on the rent (*certa merces*) could be sustained the detail was perhaps less important.

The level of detail on which the parties had to agree regarding the *merces* was a fertile ground for juristic discussion as the following text shows:

> D.19.2.25 pr (Gaius 10 ad Ed. Prov.)[239] Si merces promissa sit generaliter alieno arbitrio, locatio conductio contrahi non videtur: sin autem quanti Titius aestimaverit, sub hac condicione stare locationem, ut, si quidem ipse qui nominatus est mercedem definierit, omnimodo secundum eius aestimationem et mercedem persolvi oporteat et conductionem ad effectum pervenire: sin autem ille vel noluerit vel non potuerit mercedem definire, tunc pro nihilo esse conductionem quasi nulla mercede statuta.
>
> If the payment to be made for a *locatio* is agreed to be of such amount as shall be determined by a third party, not specified, it is held that there is no *locatio* at all: if however it is to be for such value as shall be awarded by Titius, it is a

[237] Mayer-Maly, *Locatio conductio*, 63–69.

[238] Locatio autem et conductio similibus regulis constituitur; nisi enim merces certa statuta sit, non videtur locatio et conductio contrahi.

Hire is formed under similar rules; unless a definite charge is settled there is considered to be no hire. [Gordon Robinson translation].

[239] The final passage *sin … statuta* of this text bears a resemblance to the first stentence of C.4.38.15.2 which is an Imperial decree dating from the reign of Justinian as noted by Mayer-Maly.

> conditional *locatio*, viz. on these terms, that if Titius settles what the payment is to be, then it becomes a final arrangement, so that the money must be paid over according to the award, and the contract will be regarded as fully made: but if the referee is unable or unwilling to determine the sum, then there is no contract of lease at all for want of fixed terms as to payment.
>
> [Monro translation]

As in the previous case, a corresponding passage from the Institutes of Gaius exists (Inst.Gai.3.143).[240] In the text from his Institutes, Gaius leaves the question whether a contract can be said to have come into existence where the parties did not agree on a *merces* at the start unanswered. This suggests that D.19.2.25 pr was subsequently manipulated.[241] Be that as it may, D.19.2.25 pr demonstrates the complexity that could arise surrounding an agreement on the rent: Two scenarios are discussed in this text. First, if the parties do not agree on the *merces* and leave the fixing of the rent to an unspecified third party, no contract can be said to arise. This is compatible with the central function of consent at the heart of the contract. Any legal claims arising from such an agreement would have to be dealt with in terms of the *actio praescriptis verbis*. Secondly, if the parties do not agree on the *merces*, but leave the fixing of the rent to a specified third party (Titius), there are two possible outcomes. As soon as Titius fixes the rent, a contract of letting and hiring comes into existence.[242] Any claims arising from the period before the contract comes into existence will have to be dealt with under the *actio praescriptis verbis*. If Titius cannot or will not fix the rent, no contract comes into existence.[243] These texts aptly demonstrate the tension between the rule that *merces* had to be *certa* and the fluidity of the intention of the parties.

A further important point to make in relation to the *merces* is that letting and hiring was a commercial contract. Since the underlying motive for

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240 Unde si alieno arbitrio merces permissa sit, velut quanti Titius aestimaverit, quaeritur, an locatio et conductio contrahatur. Qua de causa si fulloni polienda curandave sarcinatori sarcienda vestimenta dederim nulla statim mercede constituta, postea tantum daturus, quanti inter nos convenerit, quaeritur, an locatio et conductio contrahatur.

And so the question arises whether hire is formed when the hire charge is left to be decided by another party, for instance, where it is the valuation made by Titius. For this reason if I give clothes to a cleaner to be cleaned or to have some other treatment, or to a tailor to be mended, and the charge is not fixed then and there but left to our later agreement, there is a question whether hire is contracted. [Gordon Robinson translation].

241 Mayer-Maly, *Locatio conductio*, 84–86; Fiori, *Locatio conductio*, 241–245.

242 See D.19.5.22 (Gaius 10 ad Ed. Prov.).

243 Costa, *La locazione di cose*, II § 10.

existence of the contract was to make a profit (see D.44.7.25.1 (Ulpian. 1 Reg.)),[244] the parties could not agree on a nominal rent. This is explained in the following text:

> D.19.2.46 (Ulpian. 62 ad Ed.)[245] Si quis conduxerit nummo uno, conductio nulla est, quia et hoc donationis instar inducit.
>
> If a man hires for a nominal sum, it is no hiring at all, it is as good a case of a *donatio* (gratuitous agreement) as any other. [Monro translation]

A contract of letting and hiring where the parties agreed on a nominal rent was legally void. The *merces* had to be *vera*. The reason for this is likely the lack of "economic" intent. Agreement on a nominal rent undermined the commercial motive underlying the contract of letting and hiring.[246] A related issue which needs to be stressed here is proportionality as an essential element of the reciprocal obligation at the heart of letting and hiring.[247] Thus, the *merces* had to be paid in proportion to the counterperformance (*uti frui* of a *res*/*operae* of a *homo*) received.

Following a strict interpretation of the law relating to the *merces* set out above, it must be concluded that this contract in TPSulp. 45 was void. It has to be remembered, however, that legal practice may well have diverged from legal doctrine and it is possible, given the wider context of this inscription, that this contract was taken as being valid. Both Lintott and Jones have pointed out that Gaius Novius Cypaerus was the patron of Eunus and that this may account for the charging of the nominal rent.[248] This shows, as already mentioned before, that different rules applied between patron and freedman.

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244 Actionum autem quaedam ex contractu, quaedam ex facto, quaedam in factum sunt. Ex contractu actio est, quotiens quis sui lucri causa cum alioquo contrahit, veluit emendo vendendo locando conducendo et certeris similibus. …

Some actions, however, arise from a contract, others from an act, and some are in factum. An action arises from contract whenever someone contracts with another for his own benefit, for example, by buying and selling, by letting and hiring and other like transactions. … [Watson translation].

245 This text is not suspected of interpolation, although Mayer-Maly has shown that this text is probably an excerpt from D.41.2.10.2 see Mayer-Maly, *Locatio conductio*, 128–129. On this text see also Costa, *La locazione di cose*, II § 7; Fiori, *Locatio conductio*, 270, 271, 280. See also D.24.1.52 pr (Papin. 10 Quaest.); D.19.2.20 pr (Paul. 34 ad Ed.).

246 It also raises an interesting question about an aspect of the relationship between the contracts of sale and of letting and hiring. While the rules concerning price are almost identical in these two contracts, *laesio enormis* does not exist in letting and hiring. The absence of this equitable remedy in letting and hiring has not been satisfactorily examined, but seems to be related to the temporary nature of letting and hiring.

247 Thomas, 1971 *RIDA* (18), 673–689, 681.

248 Lintott, 2002 *CQ* (NS) (52-2), 555–565, 557 and Jones, *Bankers*, 96.

This tablet is significant for a variety of reasons. Not only does it provide useful information on the practice of moneylending, but it also contains invaluable insight into the nature of *locatio conductio* in the context of the letting and hiring of warehouses. The wording of the document confirms that the contract between a *horrearius* (acting via a slave) and a *conductor* (also acting via a slave) was one of letting and hiring. The use of the formula "*scripsi me locasse*" and its accusative *horreum duodecimum* furthermore resolves the issue about the type of letting and hiring. As Thomas had rightly postulated, it was clearly an example of *locatio conductio rei*. More importantly, however, it is quite clear that the contract of letting and hiring also served another purpose in this tablet. It was not merely aimed at securing a space within the warehouse in which to deposit goods for safekeeping, since the wheat was already in storage there. Rather, the aim of the contract was to ensure that the creditor obtained and retained possession (in both a practical and legal sense) of the wheat pledged as security for the repayment of the loan. This is a singular application of the contract that is merely hinted at in the legal sources (e.g. D.20.4.21.1) and for which this document now provides conclusive evidence. This text requires some analysis:

> D.20.4.21.1 (Scaev. 27 Dig.) Negotiatori marmorum creditor sub pignore lapidum, quorum pretia venditores ex pecunia creditoris acceperant: idem debitor conductor horreorum Caesaris fuit, ob quorum pensiones aliquot annis non solutas procurator exactioni praepositus ad lapidum venditionem officium suum extendit: quaesitum est, an iure pignoris eos creditor retinere possit. Respondit secundum ea quae proponerentur posse.
>
> A loan was made to a marble dealer subject to a pledge of the marble slabs, the sellers of which had been paid with the creditor's money. The debtor was also lessee of an imperial warehouse, rent for which had not been paid for a number of years. The imperial procurator claimed to sell the slabs in pursuance of his duty to exact payment. The question put was whether the creditor could retain them by way of pledge. Scaevola replied that according to the facts stated he could. [Watson translation]

A marble dealer bought slabs of marble with money borrowed from a third party (possibly a moneylender). The third party lent the money to him on condition that he could secure a pledge over the marble slabs to ensure payment of the loan. The slabs were stored in a state-owned warehouse in which the marble dealer had previously rented some space. He had not paid the rent for these stalls for some time and at some later point the *horrearius* (Imperial procurator) decided to enforce his tacit hypothec over the goods stored by the marble dealer in order to sell them to recover

the rent owed.[249] The question was put to (Quintus Cervidius) Scaevola whether the *horrearius* should succeed with his claim or whether the creditor should be able to counteract this claim based on his hypothec over the slabs. Since the text has been stripped of its context, much of the crucial detail remains obscure. It is, for example, unclear whether the creditor "took over" the contract concerning the space in the warehouse to obtain possession of the marble slabs as is evidenced by the practice described in the Murecine tablets. It is proposed that, given Scaevola's conclusion, this could very well have been the case. The *horrearius*' tacit hypothec over the good stored in the warehouse was clearly *prior in tempore*, since the texts mentions that rent had been owed for a number of years before the transaction involving the marble slabs occurred.[250] Notwithstanding that, however, Scaevola argued that on the facts stated, the creditor's claim over the marble slabs, based on hypothec, was *potior in iure* and therefore had to succeed. This might very well have been the motivation for using letting and hiring to secure possession of goods used as a pledge in a larger commercial transaction.

Returning to the analysis of TPSulp. 45, it seems safe to assume that this type of contract would have been of short duration i.e. until the loan had been repaid. What happened after repayment remains unclear, but presumably the owner of the wheat, Eunus, would have entered into a new contract with the *horrearius* for the letting of the same grain stalls in which the wheat was stored unless, of course, the wheat had by that time already been used as security for another loan.[251]

Another notable observation relates to the nature of the tablet as a *lex locationis*. It was the written embodiment of an agreement between the *horrearius* and the *conductor* both acting via their slaves. Except for the explicit attention in the document to the *iussum* of the respective owners for reasons of contractual liability, it shows how formless the consensual contract of letting and hiring was. The only *essentialia* mentioned are the formula "*scripsi me locasse*", the thing to be let and the price. But this apparent freedom of form is not the only noteworthy element of the document.

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[249] Goods stored could not be confiscated at will to recover rent due. Roman law mentions a specific legal procedure that had to be followed when opening up rented store-rooms for the sake of attaching the goods stored there to recover the rent due, see D.19.2.56 (Paul. 1 de Off. Praef. Vig.).

[250] It may have been that there was nothing of value housed within the rented space that could be attached to recover the rent due prior to the marble slabs being deposited there.

[251] It seems implausible that the notion of a revolving stock existed in Roman law as it is not supported by the evidence.

The absences are in fact more extraordinary. Compared to the *lex horreorum Caesaris* mentioned above, the contract recorded in this tablet contains none of the technical rules of law mentioned there. A number of reasons have been proposed for this apparent discrepancy ranging from the purpose of the lease in this case to the nature of the Murecine tablets themselves. But this point should not be overstated. Apart from the fact that the object of the contract was vaguely described in TPSulp. 45, there is nothing legally objectionable about the contract. The only anomaly is that it does not mention the detailed rules of law visible in the *lex horreorum Caesaris* and this may be explained in terms of the nature of the two documents.[252]

Although the *lex horreorum Caesaris* was clearly a *lex* in the technical sense of the word, it was clearly not a contract in the private-law sense between the representative of the state and the *horrearius*. This is evident not only from the nature of the inscription, but also from the absence of any references to parties, delivery dates and signatures. Rather, it was a set of general legal rules that were probably drafted to define the parameters of the *horrearius*' commercial exploitation of the warehouse or, in other words, the *result* of the contract between the *procurator* and the *horrearius* rather than the contract itself.[253] Furthermore, judging by the nature of the inscription (a marble tablet), it seems safe to assume that it was constructed to be prominently displayed in the warehouse for all to see.[254] How these statements in the *lex horreorum Caesaris* would have interacted with individual contracts such as the one recorded in TPSulp. 45 is unclear. The nature of the legal rules contained in *lex horreorum Caesaris* may provide some answer.

Apart from practical rules relating to the date of payment and the obtaining of a receipt, the *lex horreorum Caesaris* mentions three legal rules, namely the right to sublet, the *horrearius*' liability for *custodia* and his tacit hypothec over movables (*invecta et illata*) brought into the warehouse. A survey of Roman legal texts demonstrates that these were all implied contractual clauses. The right to sublet was presumed to exist unless the parties

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252 This point has been tentatively made by Wacke, 1980 *Labeo* (26), 299–324, 310 and 318, but has not been fully explored.

253 See Wacke, 1980 *Labeo* (26), 299–324, 316.

254 Cf. the provision in chapter 63 of the *Lex Malacitana* (*FIRA* I, 215) where it is clearly stated that information about state leases have to be displayed "in such a way that they can be read from ground level, in a place in which the *decuriones* or *conscripti* decide that they should be displayed."

to the contract had made an alternative arrangement.[255] The *horrearius* (not the *dominus horreorum*) was liable for *custodia* unless the parties had made an alternative arrangement.[256] The *horrearius*' tacit hypothec over movables brought into the warehouse was said to be based on a *tacita conventio*.[257] This would explain why these provisions do not occur in the *lex locationis* from the Murecine archive. Since they were implied, all agreements that a *horrearius* entered into with individual *conductores* would have been subject to them *ipso iure*. These clauses need not have been expressly mentioned or even incorporated in the contracts. It was presumably only where the parties chose to deviate from them, that it had to be mentioned in the contract. To ensure an element of publicity (no doubt to satisfy the *fides* of the contract), they were publicly displayed as demonstrated in the *lex horreorum Caesaris*.

This example of a *lex locationis* from the Murecine archive therefore provides the pivotal counterbalance to the *lex horreorum Caesaris* in that it demonstrates the Roman attitude towards implied conditions in law. It also sheds significant light on the practice of letting and hiring of warehouses. In state-owned warehouses a set of legal rules would have been drafted and displayed prominently. They were implied by law and therefore governed all contracts entered into between *horrearius* and his *conductores*. The contracts themselves could be quite short and need not contain anything apart from the *essentialia* required for *locatio conductio rei*.

Knowledge about the letting and hiring of privately-owned warehouses is even more fragmentary as very few legal sources exist on the subject. In terms of the legal structure outlined above, the only real difference between state-owned and privately-owned warehouses is that in the latter case the *dominus horreorum* would have been an individual and that the contract

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255 C.4.65.6 (a. 224) Nemo prohibetur rem quam conduxit fruendam alii locare, si nihil aliud convenit. [Blume translation].

A person is not forbidden, if no agreement to the contrary is made, to sublet property which he has hired, for use by the sub-lessee. And on this text, see Du Plessis, 2005 *RIDA* (52), 132–144.

256 D.19.2.60.9 (Lab. 5 Post. a Iavoleno Epit.).

257 D.20.2.3 (Ulpian. 73 ad Ed.) Si horreum fuit conductum vel devorsorium vel area, tacitam conventionem de invectis illatis etiam in his locum habere putat Neratius: quod verius est.

If a warehouse, hotel, or site is leased, Neratius thinks that there is here also an implied agreement for the hypothecation of goods brought in. This is the better view. [Watson translation].

of lease between the *dominus horreorum* and the *horrearius* would have been governed by the rules of *locatio conductio rei* in Roman private law. There is evidence to suggest that the legal practice concerning the letting and hiring of privately-owned warehouses was similar to that followed in state-owned warehouses. A mutilated inscription, dating from the second-century CE, discovered in 1910 on the Aventine records legal rules relating to the privately-owned Ummidian warehouses.

> [*In his horr*]eis Umm[*idianis singulis an*]nis locan[*tur horrea apothecae comp*] endiaria ar[*maria intercolumnia et loc*]a ex hac d[*ie et ex kalendis Iuliis*.
>
> *Quae in his horreis i*]nvecta inla[*ta importata erunt, horreario pig*]nori erunt d[*onec satis ei factum non sit aut pensi*]o solvatur.
>
> S[*i quid in his horreis conductor in*]aedificaverit, [*tollendi ius non habebit, nisi dat*]a ei reficiendi po[*testas fuerit* ---------------] idie [------------].[258]
>
> In these Ummidian warehouses are let for a single year store-rooms, chests between the columns [?] and spaces from this day and from the 1st of July.
>
> Whatever has been brought into the warehouse, shall be pledged to the *horrearius* for as long as security has not been given to him or the rent has not been paid.
>
> If the *conductor* has walled up anything in these warehouses, he shall not have the *ius tollendi*, unless the power to correct it was given to him.
>
> [Own translation]

Although much shorter than the *lex horreorum Caesaris*, it contains similar rules of law relating to the tacit hypothec over movables brought into the warehouse as well as the conductor's *ius tollendi* for permanent alterations made to individual spaces. This seems to suggest that much of the private-law rules concerning the letting and hiring of warehouses applied in public law as well. These may also be classified as implied contractual provisions and an argument could therefore be made that this epigraphic inscription fulfilled the same function as the *lex horreorum Caesaris*, namely a summary of the legal parameters within which the *horrearius* was permitted, by virtue of his agreement with the *dominus horreorum*, to utilise the warehouse for commercial purposes.

Earlier in this chapter it was argued that these inscriptions interacted with individual contracts on the basis of the implied contractual conditions contained in them. Individual contracts between the *horrearius* and his

258 Reconstruction taken from *FIRA* III, 457.

customers did not need to contain any explicit mention of the rules of law stated in the *lex horreorum* since all contracts were regarded as being tacitly subject to them. That this practice was also followed in the letting and hiring of privately-owned warehouses seems to be confirmed by a second tablet from the Murecine archive (TPSulp. 46).

> TPSulp. 46 C(aio) Laecanio Basso Q(uinto) Ter[en]tio Culleone co(n)s(ulibus), III i[du]s Martias (13 March 40 AD). Nardus P(ublii) Anni Seleuci servus sc[ri]psi coram et iussu Sel[eu]ci domini mei, [q]uod is negaret se litteras scire, m[e] locasse C(aio) Sulpicio Fausto horreum vicensimum et sexstum, quod est in praedis Domitiae L[e]pidae B[a]rbatianis superioribus, in quod respositum est tritici Alexandrini millia mod[iu]m decem et tria, [quae] admetietur dominus meus cum s[er]vis [sui]s, m[er]c[ed]e in mensibus singulis sestertis centenis nummis. Actum Puteolis.[259]
>
> I Nardus, slave of Publius Annius Seleucus, have written: In the presence of and at the order of my master Seleucus (because he says that he does not know how to read and write) I have leased to Gaius Sulpicius Faustus Bunker No. 26 in the upper Barbatian warehouses of Domitia Lepida, in which are stored 13,000 modii of Alexandrian wheat (which my master will check with his slaves) for rent of HS 100 per month. [Jones translation]

This tablet records a contract between a *horrearius* of a privately-owned warehouse, Publius Annius Seleucus (again acting via a slave, Nardus) and an individual *conductor* (Gaius Sulpicius Faustus) relating to a grain stall. As in the previous case, certain background information needs to be assumed.[260] A third party, Lucius Marcus Iucundus owned a certain amount of wheat which he had stored in the warehouse in question. He needed to raise a loan and approached a moneylender, Faustus. To ensure repayment of the loan, Faustus secured a pledge over Iucundus' wheat by "taking over" the lease of grain stall 26. This involved entering into a new contract of lease with the *horrearius* and it is this contract which is recorded in the tablet in question.

Although there is no direct relationship between the *lex horreorum* of the privately-owned Ummidian warehouse and the contract recorded in TPSulp. 46, it seems plausible, in light of the argument developed above, that they represent two sides of the letting practice commonly used in the letting and hiring of warehouses. As in TPSulp. 45, the absence of any mention to the technical rules of law in the contract of lease combined

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259 Reconstruction taken from Camodeca, *Tabulae pompeianae sulpiciorum*, 125.
260 For background information, see TPSulp. 53 and 79.

with the implied nature of the legal rules mentioned in the *lex horreorum* of the Ummidian warehouses suggest that these documents must have stood in a similar relationship. Furthermore, despite the fragmentary nature of the Ummidian *lex*, there seems to be a large measure of similarity between private and state practice in the letting and hiring of warehouses.

CHAPTER FOUR

CONCLUSIONS

The publication in 1999 of Fiori's study on the contract of letting and hiring had a profound effect on modern scholarship on the subject. By demonstrating that the Roman jurists focused on the underlying reciprocal obligation at the core of the contract rather than its "subject" or "object", Fiori's study forced modern scholars to fundamentally reconsider the contract and the legal rules contained in it. The findings of this study, combined with insights by scholars such as Martin and Kehoe, provided the inspiration for this book. In this study, I have attempted to harness these approaches with a view to provide new insights into the contract of letting and hiring. In this sense I have gone further than merely providing a "law in context" account of the contract. Rather, I have used Fiori's insight into the conceptual structure of the contract of letting and hiring combined with Kehoe's notion of "normative reality" to indentify a number of stock examples on which the Roman jurists focused when developing the contract of letting and hiring. This has been done to further expand upon an idea first raised by Martin, namely that the Roman jurists used certain basic common ideas in order to develop the contract of letting and hiring.

These "normative" examples operated within a specific context provided by Roman law. To understand this context and its impact on these examples, chapter 1 provided an overview of various issues such as the history and terminology of letting and hiring as well as its conceptual structure as proposed by Fiori. This was followed by an account of the contractual process with a view to demonstrating the continuous nature of consent and its importance for letting and hiring. The final part of this chapter focused on litigation. The *formula* of the actions was examined in light of Fiori's findings on the structure of the contract and the notions of contractual risk and contractual liability were comprehensively explored in light of the texts.

Chapter 2 investigated letting and hiring of *operae* as a conceptual category within the contract of letting and hiring. Once a number of "normative" examples had been identified, these were grouped into five refinements to demonstrate certain underlying ideas which the Roman jurists used to develop the contract. In letting and hiring of *operae* which involved the

transformation (in a broad sense) of the property of one of the contracting parties, the two main underlying ideas were contractual liability for the object while in control of the *conductor*, expressed through the notion of *custodia* and, in the cases where the transformation involved the creation of new object, the contribution of raw materials by the *locator*. In the latter case, a distinction was drawn between movable and immovable property following the basic rules of *accessio*. In letting and hiring of *operae* which involves the movement of the property of one of the contracting parties, two underlying ideas prevailed. The first was the liability for the goods of the *locator* while under the control of the *conductor* and secondly, the extent of the *conductor*'s liability for the actions of his staff (whether slave or free). In the latter case, the extent of liability was intimately connected to the complex management structures involved in transport. In letting and hiring of *operae* traditionally classified as *artes liberales*, it was shown that this category should be abandoned. It is not a Roman category and it is clear that the "professions" traditionally identified as part of this category could be the subject of letting and hiring. The narrative of "elitism and exclusion" which formed around this category on the basis of philosophical works from the ancient world was comprehensively deconstructed by Coppola and should therefore be abandoned. In letting and hiring of *operae* often tainted by social opprobrium, both named and unspecified *operae* were examined. As in the case of *artes liberales*, this category was largely overshadowed by modern discussions on legal status and a narrative of "subjection" which had arisen around the traditional civilian category of *locatio conductio operarum*. By refocusing the discussion away from the "subject" of the contract (*mercennarius/operarius*) and by adopting a more restrained view of the notions of status and subjection, it became clear that these named and unnamed *operae* could be the subject of a *locatio conductio*. The final refinement to be examined in this chapter involved the letting and hiring of *operae* in relation to the Roman *familia*. While traditionally these two categories have been excluded from discussions on the contract, it was shown in this chapter that both the *operae* of slaves and of freedmen could be rented out. In both cases, however, the commercial nature of these *operae* and the modality in which they were rented out was influenced by the relationship established on the basis of the *familia*.

The focus of chapter 3 was the letting and hiring of movable and immovable property. In drawing this distinction, I wished to demonstrate that in each of these two refinements, certain underlying ideas were employed by the Roman jurists to develop the contract. In relation to inanimate movable property, the two underlying ideas were knowledge/ignorance of any

defects in it combined with the notion that the *locator* as owner vouched for the soundness of the thing rented out. As far as the letting and hiring of animate movables (slaves and animals) are concerned, the distinction between the letting of a slave as an object and the letting of the *operae* of a slave seems to have been somewhat fluid. In drawing this distinction, issues such as the skilled nature of the *operae* of the slave, the owner's desire to protect the slave from improper use and the extent of his contractual liability dominated the jurists' discussions. In relation to immovable property, the works of Frier and Kehoe have done much to identify the "perspective" of these texts. Letting and hiring of immovable property, whether in an urban or rural location, was by and large seen from a commercial perspective. Where land in a rural location has been let, with or without buildings, the underlying idea which occupied the minds of the jurists was *remissio mercedis*. Discussions of the letting and hiring of property in an urban location were similarly dominated by a commercial perspective in which, as in the case of the *insula*, the complex management structures also employed in other forms of letting and hiring also appear. This can also be seen from discussions of other immovable commercial property such as warehouses.

The survey of twentieth-century scholarship provided at the start of this book has shown that for much of this period, this contract has been studied in abstract dogmatic terms in which the rules of law, the technical terminology employed by the Roman jurists and the seemingly watertight conceptual categories which they created were more important that the larger context in which letting and hiring operated. It is the contention of this book that a dogmatic approach to the study of letting and hiring should be augmented by a greater sensitivity towards other contexts. It is only once this has been done that the full picture of letting and hiring as a complex and subtle legal entity emerges.

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